Supreme Court, U.S.
FILED
99 811 SEP 22 1999

No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

VERNON FLOYD,
Petitioner

V.

FEDERAL COMMUNICATIONS COMMISSION
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the District of Columbia Circuit err in its standard of review in upholding a Federal Communications Commission award of a new FM broadcast license decision based on vague and ambiguous financial requirements and which did not follow established precedent or relevant statutory and constitutional standards for reasonableness and procedural due process.

PARTIES TO THE PROCEEDING

Appellant:
Vernon C. Floyd

Appellee:
Federal Communications Commission

Intervenors in the Court of Appeals

Miracle Radio, Inc.
David Earl Hoxeng, d/b/a ADX Communications of Pensacola

Other Interested Party:

Pensacola Radio Partners

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES iv

CITATIONS, OPINIONS AND ORDERS ENTERED IN THE CASE.....vi

STATEMENT OF THE BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE.....2

ARGUMENT 7

APPENDIX A-1

TABLE OF AUTHORITIES

Cases **Page**

Cook v. Heckler, 750 F.2d 391 (1985).....11

Fidelity Television, Inc. v. FCC (D.C. Cir. 1975).....12

Northhampton Media Associates v. FCC
4 FCC Rcd 5517 (1989) recon. Denied,
5 FCC Rcd 3075 (1990), aff'd,
Northampton Media Associates v. FCC
941 F.2d 1214 (D.C. Cir., 1991) 10

Administrative Decisions

FCC Freezes Comparative Proceedings
9 FCC Red 1055 (1994).....2

Global Information Technologies, Inc.
FCC 97-268 (Full Commission, rel. August 4, 1997).....11

Gonzales Broadcasting, Inc.
FCC 97-283 (Full Commission, rel. August 12 1997.....11

Pensacola Radio Partners
8 FCC Red 7225 (ALJ 1993).....2

Port Huron Family Radio, Inc.
5 FCC Red 4562 (1990).....10

Statutes
Revision of Application for Construction Permit for Commercial Broadcast Station
50 RR 2d 380 (1981) 9

Revision of Application for Construction Permit for Commercial Broadcast Station
4 FCC Red 3853 (1989).....10
5 USCA Sec. 706 1,7

CITATIONS, OPINIONS AND ORDERS ENTERED IN THE CASE

Vernon C. Floyd v. Federal Communications Commission,
Order, United States Court of Appeals for the District of Columbia Circuit
No. 98-1269 June 24, 1999

Vernon C. Floyd v. Federal Communications Commission
Order, United States Court of Appeals for the District of Columbia Circuit
No. 98-1269 March 29,1999

Pensacola Radio Partners Order,
FCC 98-80 released May 12,1998

Pensacola Radio Partners Order,
I I FCC Red No. 10 released May 3, 1996

Pensacola Radio Partners Initial Decision,
FCC 93D-19 released October 4, 1993

Pensacola Radio Partners
Memorandum Opinion and Order, FCC 91-M-3483
released December 23, 1991

Pensacola Radio Partners
Hearing Designation Order, DA 90-1136
released September 24, 1990

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this case pursuant to 28 U.S.C. Sec. 1254. Appellant was a party below and is aggrieved by the final order of the Federal Communications Commission and thereafter said Order affirmed by the United States Court of Appeals for the District of Columbia Circuit.

This matter involves an appeal from United States Court of Appeals for the District of Columbia Circuit. This court has jurisdiction over this appeal. The date of entry of the judgment sought to be reviewed is June 24, 1999.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

UNITED STATES CONSTITUTION

AMENDMENT 14

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 USCA Section 706

GOVERNMENT ORGANIZATION AND EMPLOYEES -- JUDICIAL REVIEW

STATEMENT OF THE CASE

This proceeding involves mutually exclusive applications for a new FM construction permit to operate on Channel 254c2 to serve Pensacola, Florida. The appellant, Vernon Floyd filed his application to obtain a construction permit to build a new FM station on March 24, 1988. As of September 24, 1990, a total of twenty-seven applicants were originally designated for hearing.

On September 24, 1993, Judge John M. Frysiak, Administrative Law Judge issued an initial decision and found Vernon Floyd was financially disqualified. See **Pensacola Radio Partners**, of FCC R.Ed 7225 (ALJ).

In 1994 the proceeding was frozen by the Commission's Public Notice, **FCC Freezes Comparative Proceedings**, 9FCC Red 1055 (1994). The freeze was later removed.

Vernon Floyd appealed the initial decision of the Administrative Law Judge to the Federal Communication Commission. The Federal Communication Commission on May 12, 1998 affirmed the denial of the application of Vernon C. Floyd for lack of financial qualification.

Vernon Floyd in 1998 appealed to the United States Court of Appeals for the District of Columbia Circuit. In March, 1999 the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the Federal Communications Commission. Vernon Floyd's motion for reconsideration was denied on Jun 24, 1999.

Vernon Floyd appeals the entire process to the Supreme Court of the United States.

Between September 24, 1990 and September 24, 1993 a series of hearings were held on various issues surrounding the applications of the four surviving applicants, Vernon C. Floyd, Pensacola Radio Partners ("'PRP"), Miracle Radio, Inc. ("Miracle") and David Early hoxeng, d/b/a ADX Communications of Pensacola ("ADX"').

Vernon C. Floyd is a veteran in radio broadcasting, having been involved in various aspects of the business since 1953. He is presently, and was at the time of his application for license for the new FM construction permit, the owner of two radio stations located in Hattiesburg, Mississippi. Vernon Floyd has owned and been the general manager of his AM station in Hattiesburg since 1969 and of the FM station since 1982. Floyd himself has been solely responsible for the construction of both his stations from drafting operational and architectural plans to purchase and installation of the technical equipment.

When Floyd prepared the initial application for the new FM construction permit to operate on Channel 254C2, Pensacola, Florida which was filed on March 24, 1988, he had to his credit thirty-five years of broadcast experience which included almost twenty years of ownership experience. This expertise was used in developing the required budget to construct and operate the proposed facility for three months without revenue. Floyd obtained a written equipment proposal and conducted an inventory of surplus equipment and prepared an itemized list of equipment needed to construct the Pensacola facility. Since Floyd knew the complexity of the

process of applying for a new license he prudently consulted counsel to discuss the budget and formulate detailed cost estimates for the proposed Pensacola facility which figures counsel later reduced to writing. No issues were enlarged at the FCC comparative hearing in relation to Floyd's budget for the facility, and the budget of $260,527 accepted with little question.

The enlargement of issues arose in relation to Vernon Floyd's financial qualifications and misrepresentation as to his financial qualification. There was also an issue as to Floyd's site availability which was resolved in his favor. But for the financial issue, Floyd was, by virtue of his 100% quantitative integration credit enhanced by his minority status, and broadcast experience, a very slight comparative coverage preference and the fact that Floyd proposed to divest himself of his current broadcast interests, the superior applicant for being awarded the new construction permit. Floyd was also superior in his financial qualifications in that he was the only applicant who did not rely on third party financing to construct the station, instead Floyd chose to rely on his own sufficient personal resources to finance the construction and operation of the station.

Floyd's intimate knowledge of the business allowed him to formulate a budget with minimal contribution from outside sources. Floyd's intricate knowledge of his personal finances provided the "reasonable assurance" required by the FCC in certifying that he met the financial qualifications to be awarded the FM construction permit. However, Floyd reviewed his financial situation and discussed with counsel his intent to sell his Hattiesburg, Mississippi stations to provide the bulk of the

funding for the new station. Floyd also had $146,000 in cash in various checking accounts which was to be used as a secondary source of funding. All that was required of an applicant financially in filing the initial applicant at the time Floyd submitted FCC form 301 in 1988 was that the applicant have a "reasonable assurance" that he had adequate funding to construct the new station before certifying on the application that he was financially qualified and that if questioned he could provide documentation to the FCC reflecting those qualifications. There was no requirement that the financial documentation exist contemporaneous with the date of certification on the initial application.

Floyd valued his two existing stations together at roughly $500,000 to $550,000 taking into consideration the annual cash flow of approximately $130,000 produced by the stations, the fact that the stations had historically been highly rated in the market and his expectation that based on the conditions of the marketplace his stations could be sold with ease. Knowing that he would need a valuation from an appraiser if there was a question regarding his financial qualification, Floyd secured an appraiser on the day he prepared the application and indicated in the application that he was in the process of securing documentation of his funding sources. This was done in good faith with no attempt to conceal the fact that the written appraisal was not yet in existence. In fact, the ALJ concluded in the initial decision that there was no misrepresentation by Floyd regarding his financial qualification. What the ALJ failed to find was that Floyd complied with the then-existing financial requirements at the level of the initial application.

In the ensuing years Floyd's financial qualifications continued under attack in the comparative hearing process where each applicant is forced to seek enlargement of issues against other applicants, not to more closely scrutinize the other applicant's qualifications or narrow the scope of the issues, or for any other judicious or expedient reason but only to jockey for a superior position in the application process. This is done because the license Floyd and the other applicants were seeking is a valuable prize. Yet the battle in which the applicants are forced to engage is less a determination of the best qualified applicant and is more a reflection of to what length an applicant is willing to go to win the prize. There was in Floyd's case as there are in many other cases, almost as a matter of course, allegations of intentional misrepresentation of information usually financial information.

The FCC was willing to liberally extend the definition of "reasonable assurance" of financial qualification in relation to Pensacola Radio Partners (PRP), the applicant that was awarded the license. PRP provided a financing letter from a bank that was placed into conservatorship early in the application process. The FCC was willing to accept that PRP had no knowledge of the bank's diminished status and consequent threat to PRP's financing until so informed by Floyd in a motion filed during the comparative proceeding.

The degree of discretion of the fact-finder in the comparative hearing process is violative of statutory and constitutional authority. The decision in the instant case was without an evidentiary basis.

ARGUMENT

The United States Court of Appeal for the District of Columbia Circuit noted the vagueness of the agency's requirement for determining financial qualifications, nevertheless, the United States Court of Appeals for the District of Columbia affirmed the Federal Communication Commission decision on the basis that the Commission had reasonable grounds for its conclusion. Is the standard of review applied by the United States Court of Appeal for the District of Columbia Circuit is consistent with standard statutory and constitutional law.

The standard of review is set out in Section 706 of the Administrative Procedure Act, 5 U.S.C.A. Section 706 which provides as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be:

> a. Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

b. Contrary to constitutional right, power, privilege, or immunity;

c. In excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

d. Without observance of procedure required by law;

e. Unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of any agency hearing provided by statue; or

f. Unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Commission's Order was not supported by substantial evidence. Vernon Floyd testified that he owned his AM transmitter site, his studio site, his FM transmitter site, and all of his broadcast equipment and that the FM equipment was purchased new in 1982. Vernon Floyd presented copies of bank statements as of the date of certification of his financial qualifications showing that he had over $146,000.in cash in the bank. Vernon Floyd further presented evidence of a home and other investments owned free and clear of indebtedness in a net minimum of $350,000 to $400,000. Vernon Floyd's testimony was supported by expert testimony.

The Commission, nevertheless, ruled that Vernon Floyd was financially disqualified. The Commission's actions were inconsistent with precedent and not supported by substantial evidence.

The rules governing financial requirements changed over the period of time prior to the ALJ initial decision.

In 1981, the Commission revised FCC Form 301, used to apply for new broadcast stations, replacing the requirement of detailed financial documentation with a certification procedure whereby the applicant was called upon to answer the following questions either by checking "yes" or "no".

> The applicant certifies that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others, and each purchase of equipment on credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions, and equipment manufacturers) have sufficient net liquid assets to meet these commitments.

Revision of Form 301, 50 RR 2D 381, 3 82 (1981). This

rule governs applications filed between 1981 and 1989. **Northhampton Media Associates v. FCC**, 941 F.2d 1214 (D.C. Cir. 1991). In order to establish that it has "reasonable assurance," an applicant must, at the time of certification, have "reasonable and reliable evidence that the necessary funds would be available." (Applicants need not have in hand such documentation when certifying their financial qualifications; instead, they can prepare and submit such documentation after certification when requested to do so by the Commission.) **Port Huron Family Radio, Inc.**, 5 FCC Red 4562 (1990). Floyd clearly had "reasonable and reliable evidence that the necessary funds would be available" at the time of certification and the Commission's conclusions to the contrary are not supported by substantial evidence, and are inconsistent with Commission and Court precedent, and are arbitrary and capricious.

Floyd filed his application in 1988 and therefore the revised Form 301 (1981) should govern his financial qualifications.

Under the revised Form 301 (1981), once an applicant checks it is financially qualified, there is usually no basis for the staff or the ALJ to designate a financial issue, nor is there generally a basis for any other party to seek discovery on financial qualifications. The Initial Decision of the FCC did not comply with revised Form 301 (1981). The ALF's Initial Decision complied with the revised Form 1989 which required the applicant "must provide substantial and reliable evidence" of financial qualification. The FCC applied Form 301 (1989) retroactively to Floyd, this constituted a violation of Floyd's right to due process rights procedural.

Moreover, the FCC in its determination of partial settlement and non-settling parties, in Floyd's case decided adverse to the standard precedent.

The FCC has approved several cases wherein partial settlements were involved. In **Global Information Technologies, Inc.** FCC 97-268 (Full Commission, rel. August 4, 1997), the non-settling parties had their exceptions considered and adjudicated before the Review Board. However, the contrast in Floyd's case is that Floyd has not had his exceptions considered by the Review Board or by any other Commission authority.

Further, in **Gonzales Broadcasting**, Inc., 97-283 (Full Commission, rel. August 12, 1997), again the non-settling parties had already been awarded a full Review Board adjudication of their exceptions.

In comparison to the District of Columbia Circuit, in **Cook v. Heckler**, 750 F.2d 391 (1985), the Fifth Circuit Court of Appeals held that "if substantial evidence supports the administrative finding, Court of Appeals may then only review whether the administrative law judge applied the proper legal standard and conducted the proceeding in conformity with the applicable statutes and regulations; however, the standard of review is not a rubber stamp for decision and involves more than a search for evidence supporting findings but, rather, the court must scrutinize the record and take into account whatever fairly detracts from the substantiality of the evidence supporting findings."

Further, applicants for broadcast licenses as well as indi-

viduals seeking rulings on any federal agency determination should expect a consistent standard of review which involves more than a search for evidence supporting findings, but, rather the court must scrutinize the record and take into account whatever fairly detracts from the substantiality of the evidence supporting findings.

The theory of the standard comparative issue is that the Federal Communications Commission determines, before setting a case for a hearing, that each license applicant has the minimum character, legal, financial, and technical capability to operate a television station in the public interest, with the purpose of the hearing being to determine, on that basis, which applicant would serve the public interest better. **Fidelity Television, Inc.** v. FCC (D.C. Cir. 1975)

In reviewing Federal Communications Commission's decisions at comparative hearings, the Court of Appeals' function is a limited one: it is necessary only that the Court satisfy itself that the FCC acted within the bounds of its statutory and constitutional authority, that it followed its own procedural rules and regulations, that its fact-findings are reasonably articulated and based on substantial evidence in the record as a whole, that its conclusions do not deviate greatly from past pronouncements without sufficient explanation, and that in general it has engaged in reasoned decision-making. **Communications Act of 1934.** Section 307(a), 47 U.S.C.A. s 307(a).

Finally, Commission failure to follow precedent and regulation was sufficient evidence to justify the Appeal Court overturning its Initial Decision.

The FCC has failed to comply with its own precedent, regulations and constitutional law as applied to Floyd. First, the Commission did not properly resolve the issue as related to Floyd, as a nonsettling party. That the precedent established, clearly recognizes a Full Review Board hearing on disqualification prior to the Commission hearing. Secondly, the Commission applied Form 301 (1989) retroactively to Vernon Floyd's financial qualifications. In doing so, the Commission violated Floyd's constitutional right to a fair hearing.

Finally, the financial qualification procedures and vague and ambiguous. Thus, an appeal court applying the proper standard of review should have determined that the Commission's actions were in violation of precedent and statutory and constitutional law.

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ON PETITION FOR WRIT OF CERTIORARI
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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

Vernon C. Floyd v. Federal Communications Commission,
Order, United States Court of Appeals for the District of Columbia Circuit
No. 98-1269 June 24, 1999 -App. A.....A-1

Vernon C. Floyd v. Federal Communications Commission
Order, United States Court of Appeals for the District of Columbia Circuit
No. 98-1269 March 29,1999-App. B A-2

Pensacola Radio Partners
Hearing Designation Order, DA 90-113 6
released September 24, 1990 -App. C.....A-5

Pensacola Radio Partners
Initial Decision, FCC 93D-19
released October 4, 1993 .-App. D.....A-18

Pensacola Radio Partners
Memorandum Opinion and Order, FCC 91-M-3483
released December 23, 1991-App. E A-75

Pensacola Radio Partners
Order, I I FCC Red No. 10
released May 3, 1996 -App. F.....A-78

Pensacola Radio Partners
Order, FCC 98-80
released May 12, 1998 .App. G.....A-80

Testimony of Susan D. Harrison, Appraiser.-App. H.....A-92

5 USCA Section 706 -App. I.....A-96

APPENDIX A
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1269 September Term, 1998

Vernon C. Floyd,
Appellant
v.

Filed
June 24, 1999

Federal Communications Commission,
Appellee

David Earl Hoxeng d/b/a ADX Communications of Pensacola, and Miracle Radio, Inc.,
Intervenors

BEFORE: Williams, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed May 13, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner

Deputy Clerk

APPENDIX B

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-1269 September Term, 1998

Vernon C. Floyd,
Appellant

FILED
March 29 1999

V.

Federal Communications Commission,
Appellee

David Earl Hoxeng
d/b/a ADX Communications of Pensacola, and
Miracle Radio, Inc.,
Intervenors

Appeal of an Order of the
Federal Communications Commission

Before: WILLIAMS, ROGERS and TATEL, *Circuit Judges.*

JUDGMENT

Petitioner Vernon Floyd seeks review of the Commission's decision that he failed to demonstrate he had the necessary financial resources at the time of certification to construct and operate the proposed radio station. Although the court has noted the vagueness of the agency's requirements for demonstrating financial qualification, see Mission Broad. Corp. v. FCC, 113 F.3d 254, 260 (D.C. Cir. 1997), the version of Form 301 used by Floyd referred to the need to demonstrate net liquidity. See id. (quoting Form 30 1); see also CHM Broad. Ltd. Partnership v. FCC, 24 F.3d 1453, 1457-58 (D.C. Cir. 1994). Likewise, this requirement was clear from the Commission's decision in Sunshine Broad. Co., 6 F.C.C.R. 5981, 5982-83 (199 1), which was decided before the hearing with the administrative law judge.

Consequently, because the Commission had reasonable grounds for rejecting the appraisal by Susan Harrison that Floyd submitted, the use of money in his bank accounts became critical based on his own estimate of purchasing and operating costs for the new station. The documentation and testimony presented by Floyd to the Commission failed, however, to address a material issue, namely whether or not Floyd had any outstanding liabilities. Although the challenge to Floyd's financial qualification initially focused on the appraisals of his existing two stations, once Floyd testified that his bank accounts were available to finance the new station, he needed to address his net liquidity. As the Commission observed in Sunshine, statements that funds are readily available and earmarked for a particular purpose are insufficient to demonstrate net liquidity. *Id.* at 5983. Floyd

testified that he owned all of his assets, including his home and other investment properties and his two radio stations, "free and clear of any debt." Absent even a statement under oath by Floyd that he had no such liabilities as would draw down or offset his bank balances below the amount needed, however, the Commission was unable to determine that Floyd was financially qualified.

Accordingly, it is hereby ORDERED and ADJUDGED that the Commission's order be affirmed.

The Clerk is ordered to withhold issuance of the mandate herein until seven days after disposition of any timely petitions for rehearing. See D.C. Cir. Rule 41.

Per Curium

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Eva Brown
Deputy Clerk

APPENDIX C

Federal Communications Commission
DA 90-1136

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-406

In re Applications of

PENSACOLA RADIO PARTNERS (hereafter " PRP")	File No. BPH-880323MJ
GULF COAST FM GENERAL PARTNERSHIP (hereafter "Gulf Coast")	File No. BPH-880324MB
PENSY RADIO, *INC.* (hereafter "Pensy")	File No. BPH-880324MC
BILL HENRY BROADCASTING, INC. (hereafter "BHBI")	File No. BPH-880324MD
VERNON C. FLOYD (hereafter "Floyd")	File No. BPH-880324MK

PENSACOLA MINORITY BROADCAST ASSOCIATES) (hereafter "PMBA")	File No. BPH-880324MS
GAYNELL L. FORDHAM (hereafter "Fordham")	File No. BPH-880324MY
MEDIA TRENDSETTERS FOR WOMEN (hereafter "Media")	File No. BPH-880324NB
ROBERT G. KERRIGAN (hereafter "Kerrigan")	File No. BPH-880324NB
GEORGE S. FLINN. JR. (thereafter "Flinn")	File No. BPH-880324NO
KELLY A. ALLEN AND MARY JOHNSON GENERAL PARTNERS IN ALLEN/JOHNSON PENSACOLA, LTD. (hereafter "Allen/Johnson")	File No. BPH-880324NP
CHICAGO BROADCASTING INCORPORATED (hereafter "Chicago")	File No. BPH-880324NS
MIRACLE RADIO, INC.	File No. BPH-880324NU

(hereafter "Miracle")
PNS LIMITED PARTNERS (hereafter "PNS") — File No. BPH-880324NW

THE BOYD PARTNERSHIP (hereafter "Boyd") — File No. BPH-880324NZ

DAVID EARL H OXENG D/B/A ADX COMMUNICATIONS OF PENSACOLA (hereafter "ADX") — File No. BPH-8803240J

WHITE SANDS BROADCASTING COMPANY (hereafter "WSBC") — File No. BPH-88032OK

For Construction Permit
for a New FM Station on Channel 254C2 (98.7 MHz)
in Pensacola, Florida

HEARING DESIGNATION ORDER

Adopted: August 22, 1990; Released: September 24, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station. [12]

2. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by BHBI, PMBA, Flinn, Chicago, Boyd, and ADX would constitute hazards to air navigation. an issue with respect there"o will be included and the FAA made a party to the proceeding.

3. Pensy. BHBI and Floyd. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Pensy, BHBI and Floyd have filed such statements, they are deficient. Pensy has not listed specific sources of recruitment specializing in women candidates. BHBI has not listed specific sources of recruitment specializing in minority candidates. Floyd has failed to list the school(s) or other beneficiary he will utilize in his proposed training program for minorities and women interested in entering the broadcast field. Accordingly, Pensy, BHBI and Floyd will be required to file an amended EEO program with the presiding Administrative Law Judge, or an apPropriate issue will be specified by the Judge.

4. *BHBI and PNS.* BHBI and PNS have requested a waiver of 47 C.F.R. § 73.207 because their originally-filed Proposals were short spaced to noncommercial educational station WUWF(FM), Pensacola, Florida. However, on July 14, 1986, WUWF filed for a construction permit to change, among other things, its transmitter site. This application was

granted on August 19, 1987 and a license to cover this construction permit was granted on April 28, 1988. As a result of WUWF's relocation to its present site, BHBI and PNS are no longer short spaced to VAJWF. Accordingly, the requests for waiver of 47 C.F.R.§ 73.207 'will be dismissed as moot.

5. PMBA. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. PMBA has published the required notice, but the notice is deficient. PMBA fails to give the street address of its proposed transmitter site. To remedy this deficiency. PMBA must republish an amended local notice of the application, if it has not already done 'o, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

6. Chicago and Miracle. Section 11, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number. street, city. state) as well as the home address of each of its principals. Chicago and Miracle hame not completed Item 4 correctly. Chicago's application fails to list the required specific information about the applicant itself as requested in Item 4. Miracle's application gives a post office box number as the residence address for the applicant. Accordingly, Chicago and Miracle must each submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. Chicago. Section II, Page 2 (Organizational Table) of FCC Form 301 of Chicago*s application lists four principals whose total ownership interest in the corporation equals

66.39%. Chicago has not accounted for the remaining 33.61% interest in the company. Accordingly, Chicago will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order detailing the complete ownership structure of the corporation.

8. On August 1, 1988 Chicago amended its application to increase its effective radiated power (ERP) to 58 kW and decrease the antenna height'above average terrain (HAAT) to 139 meters. However, the proposed 58 kW ERP causes the application, as amended, to violate the 50 kW limit for a Class C station as defined in 47 C.F.R. § 73,211(b). Acceptance of the amendment would thus cause the dismissal of Chicago's application. Consequently, the amendment is therefore a "suicide amendment" and will be returned below pursuant to 47 C.F.R. § 73.3566(a) and Golden Shores Broadcasting, Inc. 2 FCC Rcd 4743 (1987). Chicago*s application will be returned to the status quo ante and designated for comparative hearing. [1]

9. ADX. The engineering data submitted by ADX does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. See John R. Hughes, 50 Fed. Reg. 5679 (February 11, 1985). See also Southwest Communications, Inc., released July 16 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that ADX's contour would cover approximately 96% of the community of license. Accordingly, since no waiver is required,

ADX's request for a waiver will be dismissed as moot.

10. The applicant's below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES FILED
Pensy	June 28, 1988; July 3, 1989
BHBI	November 7,1988; December 28, 1988; December 15, 1989
Media	September 21, 1988; December 2, 1988: January 6, 1989; January 9. 1989; June 6, 1990
Flinn	September 7, 1988; October 6. 1988; February 3, 1989; March 1. 1989; August 28. 1989; February 12..1990; March 30. 1990; June 13 , 1990
Allen/Johnson	March 6. 1989; March 10, 1989; May 4, 1989; May 24, 1989
WSBC	June 6. 1989 (Engineering)

11. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

12. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

13. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934. as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by BHBI. PMBA, Flinn, Chicago, Boyd, and ADX would constitute hazards to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced

pursuant to the specified issues, which of the applications should be granted, if any.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the "Opposition to Acceptance of Amendment" and "Comments on Withdrawal of Amendment" filed by Floyd ARE DISMISSED.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order. Pensy. BHBI and Floyd shall each submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

17. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.207 filed by BHBI and PHS ARE DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED. That within 30 days of the release of this Order, PMBA shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of the application has been republished.

19. IT IS FURTHER ORDERED, That Chicago and Miracle shall each submit an amendment which contains the information required by Section 11, Item 4 of FCC Form 3 the presiding# Administrative Law Judge within 30 days of the release of this Order.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order. Chicago shall submit to the presiding Administrative Law Judge a corrective amendment in accordance with paragraph 7 hereinabove.

21. IT IS FURTHER ORDERED. That the amendment filed by Chicago on August 1, 1988 IS RETURNED as unacceptable for filing.

22. IT IS FURTHER ORDERED, That the request for waiver of 47 C.F.R. § 73.315(a) filed by ADX IS DISMISSED AS MOOT.

23. IT IS FURTHER ORDERED. That the petitions for leave to amend filed by Pensy. BHBI. Media, Flinn. Allen/Johnson and WSBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal

Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay. Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1]On May 7, 1990, Emerald Coast FM Limited Partnership (BPH-8803240B) requested dismissal of its application. The request was voluntary and in accordance with our requirements governing such matters. Accordingly, the application was dismissed by Commission letter dated May 22. 1990.

[2]Floyd's pleadings styled "Opposition to Acceptance of Amendment" and "Comments on Withdrawal of Amendment" filed November 3. 1988 and February 3. 1989, respectively. against Media's September 21, 1988 amendment and Media's January 6. 1989 "Withdrawal of Amendment" are essentially petitions to specify issues. Since the Commission's Report and Order in re Revised Procedures for the Processing of Contested Broadcasting Applications ; Amendments of Part I of the Commission's Rules. 72 FCC 2d 202. 45 RR 2d 1220 (1979). directed the deletion of all issue pleadings in pending cases. the matters sought to be raised in these petitions have not been considered. Accordingly, in opportunity to raise any allegations contained therein will be afforded the parties post -designation pursuant to 47 C.F.R. 11 1.229.

[3] We believe that the return of Chicago*s amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in Alegria 1, Inc. v. FCC, Case No. 89-1096, Decided June 15. 1990. In that case, the court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C.F.R. J 73.35710). The court held that "nowhere in the order under review did the Commission explicitly invoke [the Golden Shores] policy. explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified its tolerance of a succession of major amendments. Id., at 7. Golden Shores, wrote the court. appears to be "based on the rationale that because the withdrawal of in inadvertently submitted major amendment

would not result in the procedural disruptions the rule was designed to avoid. an applicant should be given the opportunity to repair its mistake and return to the status quo ante." Id., at B. In Alegria, the court noted that Heritage made no attempt to return to the status quo ante; rather, "the Commission permitted Heritage repeatedly to amend its application until it was viable." Id., at 9. Here, we are expressly invoking the Golden Shores doctrine, noting that the return of Chicago's amendment "neither results in processing delays nor abridges any cognizable rights of other applicants." Id., at 7. Finally, Chicago's application was returned to the status quo ante with the return of its amendment.

APPENDIX D

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-406

An re Applications of

PENSACOLA RADIO PARTNERS	File No. BPH-880323MJ
VERNON C. FLOYD	File No. BPH-880324MK
MIRACLE RADIO. INC.	File No. BPH-880324NU
DAVID EARL HOXENG *d/b/a* ADX COMMUNICATIONS of PENSACOLA	File No. BPH-8803240J

For Construction Permit for a
New FM Station on Channel 254C1
in Pensacola, Florida

Appearances

Michael J. Wilhelm, Esq. on behalf of Pensacola Radio Partners: Christopher J. Holt, Esq. on behalf of Vernon C. Floyd: Gary S. smithwick, Esq. and Henry E. Crawford, Esq. on behalf of Miracle Radio, Inc: Linda R. Bocchi, Esq. and Gary Dan J. Alpert, Esq. on behalf of David Hoxeng, d/b/a/ ADX Communications of Florida: and James Shook, Esq. and Gary Schonman, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW

JUDGE JOHN M. FRYSIAK

Issued September 24,1993; Released. October 4. 1993

PRELIMINARY STATEMENT

1. This case involves four remaining mutually exclusive applicants for construction permit for a new Class A FM station in Pensacola, Florida. A total of 27 applications for this facility were originally designated for hearing.[1] The four that remain are Pensacola Radio Partners ("PRP"), Vernon C. Floyd ("Floyd"), Miracle Radio, Inc. ("Miracle"), and David Early Hoxeng d/b/a/ ADX Communications of Pensacola ("ADX").

2 . In addition to the standard comparative issue, the HDO designated an air hazard issue against ADX (HDO)¶13). That issue was resolved in favor of ADX by summary decision (order, FCC 91M-107 released January 11, 1991).

3. A prehearing conference was held on 'November 29, 1990 (Tr. 1-9). Hearing sessions commenced on September 30,1991, and concluded on October 3, 1991. (Tr. 18-897). A rebuttal session was held on October 29, 1991 (Tr. 898-963).

4. By Memorandum Opinion and Order, FCC 91M-3360 released October 25, 1991, the presiding Judge granted PRP's Motion to Enlarge Issues against Floyd and the following issues were specified against Floyd.

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[1]Hearing Designation Order DA 9(-1136. released September 24, 1990 (hereinafter "HDO").

(a) Whether Vernon C. Floyd attained reasonable assurance of access to his initial proposed transmitter site before certifying his application;

(b) Whether, at the time he certified site access. Mr. Floyd knew that the incomplete arrangements with Mr. Holloway were an insufficient basis for a valid site certification: and

(c) If either or both of the issues above are resolved adversely to Mr. Floyd, whether he is basically qualified to be a Commission licensee.

5. By Memorandum Opinion and Order, FCC 91M-3483, released December 23, 1991, the Presiding Judge granted both PRPs and Miracle's Motion to Enlarge Issues against Floyd. The issues against Floyd were specified as follows:

(a) To determine whether Vernon C. Floyd was financially qualified at the time he certified his financial qualifications;

(b) To determine whether Vernon C. Floyd misrepresented facts or lacked candor in certifying his financial qualifications: and

(c) To determine. in light of the evidence adduced under issues (a) and (b). whether Vernon C. Floyd is qualified to be a Commission licensee.

Hearing sessions On the transmitter site and financial qualifications and misrepresentation issues added against Floyd were held on February' 10-11, 1992 jr. 898-1099, 1166-1355).

6. A rebuttal hearing session commenced and concluded on March 25, 1992 and the record was closed jr. 1356-1450).

7. By Memorandum Opinion and Order, FCC 92M-W, released June 12, 1992, the record was reopened and the following issues were -specified against Miracle:

(a) Whether Mr. John Donovan, Jr., intentionally misrepresented facts in his hearing testimony; and, if so,

(b) Whether Miracle Radio. Inc., suborned the false testimony of Mr. John Donovan. Jr.; and, if so;

(c) Whether Miracle Radio is basically qualified to be a Commission licensee.

A hearing was held on the above. issues on October 20. 1992.

8. By Memorandum Opinion and Order, FCC 92M-995. released October 7, 1992 an additional issue was specified against Miracle as follows:

Whether Miracle intentionally concealed documents it was required to produce and. if so. the effect there of on Miracle's basic qualifications and comparative standing in this case.

9. The hearing on the final issue was held on January 27, 1993. Following the close of the hearing, on February 4. 1993. Miracle produced six documents which were asserted as being privileged materials. Some two weeks later, the other applicants sought to obtain the privileged documents and were granted production in Memorandum Opinion and Order,

FCC 93M-91, released March 5, 1993. On March 12. 1993. Miracle submitted an appeal of the ruling but was ultimately turned down by the Review Board on May 19. 1993. Pensacola Radio Partners, FCC 9311-20, released May 19. 1993 (Rev. Ed.).

10. On June 18. 1993, the Presiding Judge. on his own motion. established dates for filing findings of fact and conclusion of law.2 That time was later extended at the request of ADX 3 until July 26, 1993. Replies were filed August 13, 1993.

FINDINGS OF FACT

Pensacola Radio Partners

11. PRP is a Florida General Partnership operating pur.suant to a written partnership agreement between Barbara McGreevy and Martin McGreevy, who are husband and wife (PRP Ex- 1. Tr. 28). Barbara McGreevy and Martin McGreevy each owns a 50% interest in the Partnership (PRP Ex. 1. p. 1). Decision making in the partnership will be primarily by consensus of the partners (PRP Ex. 1. Attachment 1).

12. Diversification. PRP has no media interests. However if it acquires any such media interests before it is awarded a construction permit, they will be divested. Moreover, should the principals engage in employment that would violate the Commission's cross-interest policy. that employment will be discontinued if PRP receives a construction permit (PRP Ex.2).

13. Integration. Barbara McGreevy will be the general manager of the station and will devote a minimum of 40 hours

per week to her duties. As manager. she will supervise all of the station's staff, some of whom may be subject to department heads who report directly to Mrs. McGreevy. She will make all major financial decisions at the station and will have final authority over the program broadcast. She will engage in no activities, be they employment or otherwise, that would interfere with her integration commitment (PRP Ex. 3). After they filed their application, Mr. and Mrs. McGreevy acquired, through a lottery, a liquor license. They have constructed the liquor store and have been operating the business since before hearing. Mrs. McGreevy has promised to devote no more than 15 hours per month to work that is associated in any way with the liquor store. If the demands of the liquor store require devotion of more than 15 hours per month to the establishment then the store will be closed immediately and sold (Id.). Mrs. McGreevy has resided continuously within the proposed station's city grade contour since July of 1981 (Id., p. 2). Her address is a Pensacola address. However. she lives in the unincorporated area of Escambia County contiguous with Pensacola proper. in a subdivision called Grand Lagoon. If PRP is awarded the construction permit, Mrs. McGreevy will take up full-time and permanent residence with the Pensacola city limits (Id.; Tr. 178). Mrs. McGreevy is assisted at the liquor store by one other employee (Tr. 163, 242). The clerk runs the store the same as Mrs. McGreevy does- Mrs. McGreevy stated that she could be a manager (Tr. 164). Mrs. McGreevy added, however, that she would retain responsibility for overseeing that person and would continue to review the store's overall performance (Tr. 65-66).

14. Mrs. McGreevy has done volunteer work for various civic organizations. each of which is located within PRP's

proposed service area (PRP Ex. 3). In 1990. after filing its application for the Pensacola FM station, Martin and Barbara McGreevy joined the Pensacola Chamber of Commerce (Tr. 102. 259). Mrs. McGreevy has neither been an officer nor a member of any committee of the Chamber of .Commerce Jr. 103-104). In addition. she has never participated in any civic activities that-the Chamber has engaged in (Tr. 121). In 1985 and 1986. Mrs. McGreevy twice canvassed her neighborhood soliciting donations for the American Heart Association (PRP Ex. 3: Tr. 103-104). Her canvassing covered approximately 100 homes in her subdivision (Tr. 105). Since 1981. Mrs. McGreevy has been a member of Holy Spirit Catholic Church (PRP Ex. 3; Tr. 106). Her total participation has been limited to participant.ng in bake sales; Christmas food collection; glass and can drives: and attending Mass (PRP Ex. 3; Tr. 106). Since 1981. Mrs. McGreevy has worked as a volunteer collecting food and clothing for Loaves & Fishes Kitchen (PRP Ex. 3; Tr. 109). Mrs. McGreevy engages in these collections three or four times per year.

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[2] Order, FCC 93M-376. released June 18. 1993.

[3] In its Reply Findings. Miracle requested that three attached exhibits (Exhibits 1-3) be considered none of the documents was Offered into evidence by Miracle and cannot be made part of the record unless proper Commission procedure be followed. 5ee Evergreen Broadcasting Co., 7 FCC Rcd 6601. 6602 (1992). The other applicants (Joint Movants) have moved to strike paragraphs 89-93. inclusive and Exhibits 1-3. inclusive from the Miracle Reply Findings. (See Joint Motion to Strike Portion of Miracle Radio, Inc. Reply Findings.) The Motion IS GRANTED and paragraphs 89-93, inclusive. and Exhibits 1-3. inclusive. ARE STRICKEN. In light of the action taken herein. PRP*s Motion to Strike. filed September

2. 1993 IS DISMISSED AS MOOT.

15. Mrs. McGreevy claims credit for the following "broadcast-related" experience. At Wilding Studios from 1965-1969, she handled publicity (Tr. 92). She was also involved in producing TV programming that was allegedly broadcast Jr. 94). In this position, Mrs. McGreevy never managed or supervised (Tr. 92). From 1969-1970. she was involved in television production for Bell & Howell (PRP Ex. 3; Tr. 95). In 1970, Mrs. McGreevy was both registrar and teacher at Bell & Howell's School of Instructional Technology (PRP Ex. 3; Tr. 96). In 1989 for a four week period, Mrs. McGreevy served as production coordinator for Grand Valley University/Amway Corporation (PRP Ex. 3; Tr. 97).

16. Mr. McGreevy will serve as the permanent on-site manager and director of engineering devoting a minimum of 40 hours per week to that task at the station (PRP Ex. 4). He will also supervise the station's sales staff and supervise those persons involved with the content of commercials that are broadcast over the station. He will oversee the technical operation of the station. supervising employees in the proper operation of station equipment and supervising technicians maintaining and servicing station equipment. He will make-all decisions relating to new or replacement technical equipment or the station. He will also have authority to hire and fire sale personnel and technical personnel. He will not engage in activities that would interfere with his integration commitment. More particularly, he will resign his current employment with Broadcast Television Systems or such other employment he may have at the time before the proposed station goes on the air. Thereafter. he will devote no more thin 15 hours per month to work associated in any way with the

liquor store in which he is a partner with his wife (PRP Ex. 4, p. 1). Should it ever occur that the demands of the liquor store require Mr. McGreevy to devote more than 15 hours per month to the enterprise then the store will be closed immediately and sold (Id.). Mr. McGreevy stated that liquor licenses in Florida are negotiable instruments and can be sold (Tr. 247). He estimated that the going rate for a liquor license in the Pensacola area is between S55.000 and S75,000, with an average of S65.000 (Tr. 299).

17. Martin McGreevy has resided continuously within the 70 dbu contour of the proposed station since July, 1981 (PRP Ex. 4: Tr. 210). Mr. McGreevy's residence is not within the Pensacola corporate limits (PRP Ex. 4; Tr. 210). It lies within the unincorporated area of contiguous Escambia County (PRP Ex. 4: Tr. 210). If PRP is awarded the construction permit. Mr. McGreevy will take up fulltime permanent residence within the Pensacola city limits (PRP Ex. 4) Mr. McGreevy has performed some civic activities. He has been a member of the Pensacola Chamber of Commerce (Tr. 259). Since 1989, Mr. McGreevy has been a volunteer for FRIARY. a substance abuse organiza(ion in Gulf Breeze. Florida (PRP Ex. 4; Tr. 260). On two to three occasions. he has devoted four to six hours of his time to this organization by loaning it video tape equipment for its programs Jr. 262-263). Mr. McGreevy testified that he has taken courses in CPR and rescue under the auspices of the American Heart Association (PRP Ex. 4, Tr. 265). Mr. McGreevy testified that he takes instruction for three evenings eve[y two years Jr. 265). Mr. McGreevy testified that his certification was current and up-to-date (Tr. 266).

18. Mr. McGreevy claims credit for the following broad-

cast or broadcast related experience. In 1962. he worked part time for approximately a year as a contract engineer for WAEZ-FM, Miami, Florida (PRP Ex. 4; Tr. 253-254). Also in 1962, Mr. McGreevy worked 20 hours per week as a.maintenance technician for WLBW-TV, Miami, Florida (PRP Ex. 4; Tr. 255). From 1963-1966. Mr. McGreevy was primarily a maintenance and operations staffer for the University of Miami, Miami, Florida (PRP Ex. 4: Tr. 188). He was responsible for maintaining video recorders, audio recorders, and television cameras in the television projection or production facility at the learning resources center Jr. 188). From 1966-1968. he was an engineering manager for a TV production facility at Miami Dade Junior College. Miami. Florida (PRP Ex. 4; Tr. 188-189). From 1968-1970, he was studio manager for Bell & Howell Video. Chicago. Illinois (FRP Ex- 4: Tr. 190). From 1970-1972, Mr. McGreevy worked as a sales engineer for Southeast Electronics Radio & TV Supply. CO.-Jacksonville. Florida (PRP Ex. 4: Tr. 194). Southeast Electronics Radio & TV Supply Co.. did not produce programs Jr. 194). This company was a turnkey contractor that installed broadcast equipment in recently constructed buildings (Tr. 198). From 1972-1977, he was a Regional Manager for International Video Corp. Sunnyvale. California (PRP Ex. 4). International Video Corp. produced no programs. Instead, it was an equipment manufacturer that also sold turnkey systems Jr. 199). From 1977-1987, Mr. McGreevy was a regional manager for Thomson CSF Broadcast, Stanford. Connecticut (PRP Ex. 4). Thomson was also an equipment manufacturer and manufactured very high quality television equipment and systems Jr. 199-200). From 1987 to present, Mr. McGreevy has been regional manager for BTS. Salt Lake City, Utah (PRP Ex. 4). BTS produces no programming (Tr. 200). In PRP's direct case. Martin McGreevy outlined sever-

al "special projects" that he has been involved in and claims broadcast enhancement credit for his involvement (PRP Ex. 4; Tr. 200-208).

19. Auxiliary Power. PRP's proposed studio and transmitter facilities will be equipped with auxiliary power units (PRP Ex. 5).

Vernon C. Floyd

20. Vernon C. Floyd is an individual applicant for the Pensacola FM channel (Floyd Ex. 1. p. 1).

21. Diversification. Floyd presently does business as Circuit Broadcasting Company of Hattiesburg. a sole proprietorship that is the licensee of Radio Stations WORV(AM) and WIMG(FM). Hattiesburg. Mississippi. If he is awarded the construction permit for Pensacola Channel 254C2, he will divest himself of his interest in and sever all connections with WORV/WJMG prior to the initiation of program test authority for the Pensacola station (Id.).

22. Integration. Floyd is an African American and will work full time. not less than 40 hours per week, as general manager of his proposed station Ud., pp. 1-2). In that capacity,, he will have ultimate supervisory responsibility over all aspects of the station's operations including, but not limited to. the establishment and implementation of station policies: the supervision of station personnel; the management of station finances: the implementation of the station's Equal Employment Opportunities Program (Tr. 365-66); and the super-vision of all aspects of the station's technical operations (Fioyd Ex. 1, p. 2). In order to assume his duties as general

manager of the Pensacola station. he will terminate his employment at WORV/WJMG prior to the commencement of the proposed new station's operations. and he will hold no other employment (Id.).

23. Floyd presently resides in Hattiesburg, Mississippi, which is approximately 150 miles from Pensacola, Florida (Tr. 331-32). Between 1927 and 1969 he resided in Mobile. Alabama which is approximately 50 miles from Pensacola. Florida jr. 350-51). Between 1953 and 1969, Floyd attended church services about once or twice a month at the Adventist Church in Pensacola (Floyd Ex. 1, p. 7: Tr. 353). Between approximately 1958 and 1965, he attended annual "in-gatherings" at the Pensacola church to raise funds in case of disaster (Floyd Ex. 1, p.7; Tr. 410-11). Between 1958 and 1960, Floyd attended Smiley's' Temple Adventist Church in Daphne, Alabama, which also is located within the service area of his proposed station (Floyd Ex. 1. p. 7). He helped to build that church and periodically conducted services there as a local elder (Tr. 351-52). Moreover. in approximately 1958, he helped to build the Atmore, Alabama which is located within the service area of the proposed station (Tr. 350-51). He periodically attended services at the Atmore church and also conducted services there as a local elder jr. 351-411). He will move to the City of Pensacola, Florida, and will reside there on a full-time basis if his application for the FM station is granted (Tr. 346).

24. Floyd has broadcast experience, including experience in the management of broadcast facilities (Floyd Ex. 1). From approximately 1953 until 1966, Floyd was employed by radio station WMOZ(AM), Mobile, Alabama. as the station*s chief engineer (Floyd Ex-1). Since 1969, Floyd has

served as a general manager of a radio station WORV(AM) in Hattiesburg. Mississippi. Since 1982, Floyd has also been the general manager of radio station WIMG(FM). Hattiesburg, Mississippi (Floyd Ex .-I).

25. Auxiliary Power Floyd's proposed station will be equipped with emergency auxiliary generating equipment at both the transmitter and the studio sites, which. in the event of a Partial or complete power failure, will permit the station to provide continuing service to the public (Floyd Ex- 1. P. 8- Tr. 408).

Financial Qualification Issue - Floyd

26. In his application. Floyd certified that he had sufficient net liquid assets on hand to construct and operate his proposed facilities for three months without revenue (Floyd Phase 11. Ex. 1). He also indicated that he was in the process of assembling documentation of the availability of those net liquid assets (1d.).

27. Floyd alleges that prior to the filing of the application, he gathered information from a variety of sources to determine what it would cost to construct and operate his proposed facility for three months without revenue (Id.). First. he obtained a written equipment proposal from the Harris Corporation. and conducted an inventory of surplus equipment on hand at his present stations to determine whether any of those materials could be used at the Pensacola facility (1d.). He prepared an itemized list of equipment that he would need to purchase in order to construct and operate his proposed FM facility (1d.). He reviewed his equipment figures and other construction costs with counsel and calculated his

anticipated operating expenses for three months without revenue, combining that amount with his estimated construction costs and estimated legal fees to obtain a total budget figure (Floyd Phase II, Ex. 1, p. 1-2). That budget is $260,527.14 for construction and for operating the station for three months and legal fees (Floyd Phase 11, Ex. 14 App. A). There is no entry for construction of a transmitter building jr. 1119). Floyd claims that this item can be included in the "miscellaneous" (Tr. 1119) provisions in the budget. but agrees he did not think about its cost at the time he prepared his budget jr. 1193).

28. The primary source of funds being relied upon by Floyd to rn~ itthis budget is the proceeds from the sale of his present stations (Floyd Phase II, Ex. 1). He claims that he deveLoped an estimate of the stations' fair market value with the assistance of counsel. and determined that the sale proceeds from the stations would cover his estimated costs for the new FM station. He also claims that he had cash on hand consisting of S75,000 on deposit in his personal savings account. S9.000 on deposit in his personal checking account, and over S62,000 in his stations' checking account as of March 23, 1988 (rd.). This differs from the plan represented at the deposition in this process. whereby he stated only that he planned to use "proceeds from the existing station" to finance the construction and operation of his station (Tr. 1182-83). At the deposition he did not mention using cash on hand to finance the station (Tr, 1183). There is no written record of his willingness to put up cash to pay for his Pensacola station (Tr. 1199-1200) *

29. His estimate of the stations' fair market value was based upon figures for comparable stations that had been

reported in the trade press, and discussions of station values with media brokers who called him. He does not recall, however, the call letters of any of the "Comparable stations" (Tr. 1108-09). He also does not recall if media brokers actually called him before his application was filed (Tr. 1118). Based upon discussions with counsel. he believed that his stations' value could be determined by multiplying nine or ten times their cash flow or three times their gross earnings (Floyd Phase 11. Ex. 1). This method of valuation was contained in NAB publications (Tr. 1228-34), although the publications state that "these guidelines are rarely reliable" (Tr. 1297; Floyd Phase 11. Ex. 7). The stations' 1986 cash flow was S30.161. the 1987 cash flow was S49.640 (Floyd Phase 11. Ex. 1, Att. F). If the R multiple were applied to his 1987 gross revenues. the value of his station would be computed to be S341,106 (Tr. 1299-1301). Based upon his stations' performance. he formulated an estimate of the stations' value based on their earnings (Floyd Phase 11. Ex. 1). Based upon the stations' ratings and past inquiries. he estimated that the stations had a fair market value of approximately $500,000 to $550,000, not including the $62,000 that he had on deposit in the stations' bank account (Floyd Phase 11, Ex. 1). He would consult his deposit tickets "almost every week" jr. 1238) to calculate the value of his stations (Tr. 1230). He would calculate an average" on paper jr. 1283), although he does not possess these calculations any more jr. 1284). He expected that -he would net a minimum of $350,000 to S400,000 from the sale Of the stations (Floyd Phase IL Ex.1. p. 4). Prior to filing his application, there were no outstanding offers to purchase his station jr. 1107). Based upon this personal valuation, as well as the funds that he had on deposit in the bank, he believed that qualified to construct and operate his proposed Pensacola station (Floyd Phase IL Ex. 1).

30. Floyd learned that a formal appraisal was necessary to support his belief concerning the value of his stations. and on March 23, 1988, the same day, as he executed his financial certification, had his legal counsel retain Susan Harrison to appraise his stations. Allegedly he was Informed on that date that "Ms. Harrison confirmed the general accuracy of [his] estimate" (1d.), and he then certified his financial qualifications to the Commission, but claimed that he was in the process of finalizing the documentation to support that certification (Floyd Phase IL-Ex. 1. App. E; Floyd Phase 11, Ex. 1, P. 5). Ms. Harrison's testimony reflects, however, that She informed Floyd's counsel that she could not prepare an appraisal of Floyd's stations for at least a week, and her testimony reflects that she did not prepare his appraisal until June 8. 1988 (Floyd Phase U, Ex. 2, p. 3, Tr. 979). and she has "absolutely no memory" of providing an opinion as to the value of the station when Floyd's attorney first called (Tr. 1097) The appraisal was not ultimately obtained until June 8, 1988 (Floyd Phase II. Ex. 1, App. F). Also during cross-examination. Floyd admitted that when he filed his application. he was not actually finalizing any documents at that point (Tr. 1217).

31. Ms. Harrison's appraisal was based upon an analysis of the Stations operations and staffing, financial performance and history. equipment and programming (Floyd Phase U. Ex. 2. p. 3). She computed the stations' net revenues and total operating revenues for the years 1986 and 1987 and computed the stations' operating cash flow and cash flow margin for those years, and referred to sales of what she-considered to be comparable stations in comparable markets. for confirmation Tr. 1031-32; Floyd Phase 11, Ex. 2, p. 3). The sales figures for

other stations were obtained from "Broadcasting Magazine" (Tr. 1007). She does not know whether the figures in "Broadcasting" reflect cash sales or sales with terms included (Tr. 1023). She applied a multiple of nine-ten times operating cash flow (Tr. 987). "Cash now" is operating income before depreciation. interest. taxes, and capital expenditures jr. 987). It is net revenues minus total operating expenses (Tr. 1064). In this case. "cash flow" was S49.640 (Tr. 1036). If Floyd's salary is 'excluded. the cash flow then is higher (Tr. 1014. 1085). Floyd confirmed that a salary for him was not included in the financial information provided to Ms. Harrison (Tr.1207). A station manager would be paid S200-250 a week (Tr.1252). Based upon the valuation. she estimated the stations' fair market value to be between $445.000 to $495.000 (Floyd Phase IL Ex. 3. p. 4). "Fair market value" is the cash price that would be paid by a willing buyer within a reasonable amount of time jr. 1018. 1074). She has never inspected Floyd's station Tr. 1008). She does not know if Floyd has paid himself a salary (Tr. 1084). which she agrees could affect her economic analysis of the station (Tr. 1013). She also did not consider the population in the service area of the stations (Tr. 993). the stations ratings (Tr. 996). the growth of the of the area (Tr. 1948), or the staffing of the stations (Tr. 1085). Although she could not cite a source she believes 10 times multiples were commonly used in appraisals at the time (Tr. 1064-65). Based upon the stations' cash flow in 1987 of $30,000, the stations were worth $300,000 in 1987 (Tr. 1098). Today Six and one half seven times cash flow is a typical multiplier (Tr. 1028). Although she has done "appraisals" in the past (Tr. 1098)she has never gone back to see if the appraisals were correct (Tr. 1019).

32. Charles Giddens Appraisal, Charles Giddens, Presi-

dent of Media venture partners ("MVP") a brokerage, appraisal and analysis firm, also provided an appraisal (Tr.1361 1). MVP was the largest transaction mergers and acquisition company in the broadcasting business in 1991(Tr. 1361). Mr. Giddens has personally appraised 75 stations and VP has conducted several hundred (Floyd Phase 11, Ex. 3; Tr. 1364-65). Mr. Giddens has personally been engaged in providing media brokerage services since 1984 (Tr. 1365). Other than working for MVP. Mr. Giddens owns a number of stations personally (Tr. 1366). He has worked in almost every position in the broadcasting business and he has participated as a speaker in broadcast industry functions (Tr. 1366). These public speaking engagements have principally touched on the methodology and mechanics of station evaluation (Tr. 1367). Mr. Giddens described several different formulas and methodology that are used in evaluating a radio station: discounted cash flow. multiple cash flow, multiple of gross revenue, net revenue, and comparable (Tr. 1369-71).

33. Mr. Harrison relied on in evaluating WORV/WJMG, It was Mr. Giddens* opinion that as of March 24. 1988. the fair market value of WORV/WJMG was $270.000 on "terms" (netting $75.000 in cash) and in the range of $200.000 for a cash transaction (Tr. 1379. 1381, 1430).

34. In analyzing the same data use by Ms. Harrison. Mr. Giddens; noticed that salary wages for a general manager, sales manager and chief engineer were omitted (Tr. 1389). These are the three roles that Floyd plays in operating WORV/WJMG. In this type of circumstance. where an owner is wearing several "hats." Mr. Giddens testified. that in forming an appraisal, it is germane to construct a cash flow model that reflects the new owner's position and the other personnel

hired to operate the station (Tr.1390). Mr. Giddens testified that payment of additional salaries would be necessary to operate WORV/WJMG 1991). Mr. Giddens; estimated that approximately. 158.000 -salaries would be necessary for a new Owner to replace Floyd (Tr. 1391). Therefore. to prepare an accurate appraisal, $58.000 in expenses would have to be factored into the methodology (Tr. 1391-92). If this amount is factored into the cost estimates for the stations. the cash flow would go from positive to negative (Tr. 1391). According to Mr. Giddens. if a station has a negative cash flow. an appraiser cannot use a "cash flow" methodology to predict or estimate the value of the station (Tr. 1392).

35. Therefore. the final appraisal value, assuming a sale on terms, was $270.000 (Tr. 1428). Mr. Giddens arrived at a cash sale range of $20.000 to S216.000 by multiplying $270,000 by a 20% discount jr. 1429). Site Availability Issue

36. Floyd states that on or about March 15. 1988, he travelled to Baldwin County. Alabama. to locate a suitable site upon which to construct a broadcast tower for his proposed Pensacola station (Floyd Phase 11, Ex. 3. p. 1). Prior to that time. he learned frOm counsel that he would need to deal directly with the site owner or his authorized representative. and reach a meeting of the minds with the site owner or his agent concerning key sale or lease terms. such as the exact location and size of the site. the expected sale price. and any other conditions the owner might have concerning the sale (Floyd Phase 11, Ex. 3, p. 1).

37. Floyd located several parcels of property which had signs on them indicating that they were available for purchase and physically inspected several of those parcels (Floyd

Phase 11. Ex. 3, p. 1). This included a parcel advertised for sale through Century 21 Coastline, Inc.. and he called Mr. Archie Holloway at Century 21 to obtain additional information regarding the property (Floyd Phase 11, Ex. 3, p. 1-2).

38. Floyd informed Mr. Holloway that he was planning to apply to the Federal Communications Commission for a new radio ' station, and that he was trying to locate property upon which to build a broadcast tower if his application was granted (Floyd Phase 11. Ex. 3. p. 2). Floyd told Mr. Holloway that he would need approximately five acres of land. and asked him about the parcel that he had seen advertised (1d.). Floyd needed a piece of property 700 feet on a side (Tr. 1336). Floyd learned that the parcel was only two acres. but that an adjacent two-acre parcel that Holloway owned himself also would be available (1d.).

39. Floyd and Mr. Holloway established a purchase price of $22.000 for the property and also agreed upon payment terms. Mr. Holloway told Floyd-that he would prepare the necessary documentation and subsequently Floyd received two preliminary purchase contracts together with a cover letter dated March 18. 1988 (Floyd Phase 11, Ex. 3). The contracts were preliminary because they were in the form of offers that were subject to review and acceptance by the property owners (Floyd Phase 11. Ex. 4).

40. Mr. Holloway anticipated that Floyd would sign the contracts and return them to him within a reasonable amount of time so that his offer could be reviewed and considered Vd.). Mr. Holloway did not advise Floyd that the contracts needed to be signed by a particular date, but he did inform Floyd that he could not hold the property unless Floyd sub-

mitted a written offer (Id.). The contracts were never signed (Floyd Phase 11, Ex. 3). Floyd was to make a good faith deposit by March 30. 1988 Jr. 1344. 1351). Floyd then certified that he had reasonable assurance of the availability of his-site (Floyd Phase II, Ex. 3. p. 3). He did not make the deposit (Tr. 13S2). He later secured an alternative transmitter site (Floyd Phase 11. Ex. 13. P. 4). and amended his proposed site on May 23. 1988 (Floyd Phase 11, Ex. 3. p. 5).
Miracle Radio, Inc.

41. Miracle is a Florida corporation with two classes of stock (Miracle Ex. 1. p. 1). The corporation is authorized to issue 500 shares of Class A voting stock and 500 shares of Class B non-voting stock (Miracle Ex. 1. p. 3). Gerald Don Schroeder is President, a director and owns 75 shares of Class A voting stock. which represents all of the company's outstanding voting stock (Miracle Ex. 1. p. 1). His wife. Gail Rose Schroeder, is secretary/treasurer and a director of Miracle. but owns no shares of stock in the corporation (1d.; Tr. 713). Frederic G. Levin owns 25 shares of Class B nonvoting stock, but is neither an officer nor a director of the corporation (Miracle Ex. 1, p. 1).

42. Diversification. Miracle is licensee of daytime only standard broadcast station WSWL(AM). Pensacola. Florida (Miracle Ex. 3. p. 1). Neither Miracle. nor any of its principals have any other current interest or connection with any other mass media (1d.).

43. In the event Miracle's application for construction permit is granted as a result of Miracle's comparative superiority after a comparative hearing, and not through a settlement and not as the result of the award to Miracle of a

"Daytimer Preference" e described in Memorandum Opinion and Order, 59 RR 2d 1221 (1986), Miracle, Gerald Don Schroeder and Gail R. Schroeder will divest themselves of any and all media interests and any other connections they may have, including WSWL(AM). prior to the initiation of program tests by the FM station (1d.). However, in the event the construction permit is awarded to Miracle based on its comparative superiority after a comparative hearing in which part of the comparative superiority is based upon a grant of a Daytimer Preference, pursuant to Memorandum Opinion and Order, supra, the applicant, Gerald Don Schroeder and Gail R. Schroeder will divest themselves of WSWL~AM) within three years after the initiation of program tests by the FM station (1d.; Tr. 458).

44. Miracle's non-voting shareholder, Frederic G. Levin, holder of a 25% non-voting interest in the applicant has an interest in Blab Network, Inc., which furnishes programs to cable television systems in the Pensacola area, and to other areas Vd.. pp- 1- 2). His wife and children also have ownership interests in Blab Network. Inc. Gerald Don hosts a weekly two hour cable television program distributed by Blab Network. Inc. (Id-, p. 11).

45. In the event Miracle*s application is granted based upon Miracle's comparative superiority after a comparative hearing, and not through a settlement, Mr. Levin and his wife will divest themselves of any interest in or connection with Blab Network, Inc., and Mr. Schroeder will terminate his cable television program prior to the initiation of program tests (1d., p. 2).

46. Miracle's voting shareholder, Gerald Don Schroeder,

and its non-voting shareholder. Frederic G. Levin, have been fife-long friends (Tr. 490: 86). Mr. Levin has been heavily subsidizing the operation of Station WSWL(AM) g, (Tr. 494-95), and has a reciprocal trade agreement with respect to Levin's Blab Network (Tr. 495-96). Mr. Levin and Mr. Schroeder have been involved in numerous business endeavors together over the years, such a Chicks Bar-B-0 (Tr. 505). the record business (Tr. 500). and the nightclub business (Tr. 504-06) ("Papa Don Productions") Tr. 509). Mr. Levin has a history of providing personal loans to Mr. Schroeder (Tr. 516) and loaned him money to begin utilizing CNN Radio at WSWL(AM) (Tr. 517).

47. After deciding to retain counsel for Miracle's FM station application for Pensacola, Mr. Schroeder approached Mr. Levin about financing the application (Tr, 5'14). Mr. Schroeder discussed the budget for prosecuting the application Tr. 519) and how much it would cost for the entire proiect (Tr. 519).

48. Miracle's bills are being paid. directly by Mr. Levin (Floyd Ex. 6). Mr. Levin is given copies of the bills and he writes the checks directly to the payees jr. 526). Mr. Levin "became an owner of Miracle (which owns WSWL(AM)) when Miracle's attorney was hired (Tr. 585-86). Mr. Levin also is paying expenses for Station WSWL(AM). Mr. Schroeder admitted that WSWL(AM) would not have stayed on the air without Mr. Levin's assistance (Tr. 531). At his deposition, Mr. Schroeder testified that Mr. Levin has paid 90% of the station's expenses (Tr. 532-34). He now believes that Mr. Levin has been paying 50-60% of the expenses (Tr. 532). Mr. Schroeder discusses WSWL(AM)'s operation with Mr. Levin. He lets him know how the station is doing (Tr. 587).

Mr. Schroeder discussed the change of WSWL(AM) to CNN Radio with Mr. Levin before it was undertaken (Tr. 88, 593). Mr. Schroeder also discussed the need for WSWL~AM) to change transmitter sites in 1990 (Tr. 592) and Mr. Levin gave,him the money to buy the property (Tr. 592).

49. With respect to the FM application, Mr. Schroeder keeps Mr. Levin informed about the status of the application. He told him of the designation of the case for hearing (Tr. 594). He was told how many applicants are involved in the hearing (Tr. 596), the fact that issues were enlarged against a competitor (Tr. 597), and Miracle's overall standing in the case. Mr. Levin's law firm filed Miracle's corporate amendment with the State of Florida (Tr. 604; Floyd Ex. 8), and' his law firm's secretary typed up Miracle*s corporate resolution (Tr. 603, 759). Mr. Levin was present at the special stockholders meeting (Tr. 608-9. Floyd Ex. 10). Miracle entered into an option agreement with Donovan Realty for a site known as Deer Pine Acres Jr. 618). Mr. Levin paid the payment for the initial option to purchase in 1988 jr. 619), and made another payment in the Fall of 1990 jr. 619). Mr. Levin directly paid for the renewal of the option for the land on behalf of Miracle (Floyd Ex. 13). In Floyd Ex. 13.'Mr. Levin stated that he represents Miracle (Floyd Ex. 13). Mr. Levin sent a new agreement to Mr. Donovan in October 1990 jr. 654). A copy of the new agreement was sent to Mr. Schroeder by Mr. Levin (Tr. 655). Mr. Levin has been involved in conference calls with FCC legal counsel (Tr. 637). and corresponded with him on discovery matters (PRP Exs. 18, 19, 20).

50. Gerald Don Schroeder will serve as general manager of Miracle's- proposed station. He will work full time. a minimum of 40 hours per week as general manager. Unless

Miracle still is licensee of WSWL/AM) (formerly WPFA(,AM)). Pensacola. Florida, pursuant to the FCC's daytimer preference policy, Mr. Schroeder will terminate any other employment or business interests he may have, prior to the commencement of program tests by the new FM station. If Miracle is still licensee of WSWL(AM) pursuant to the FCC's daytimer preference policy, Mr. Schroeder will work not more than 410 hours per week at WSWL(AM) (Miracle Ex. 2).

51. As general manager of the proposed station, Mr. Schroeder will oversee all aspects of the operation of the station. All department heads will report to him. Mr. Schroeder's responsibilities and duties will include but will not be limited to: (Miracle Ex. 2).

(1) Overall management of station operation and personnel. including supervisory staff:

(2) Formation and implementation of personnel policies:

(3) Formation and implementation of station's EEO program. including policy dissemination. recruitment. and training:

(4) Management of the financial affairs of the station: and

(5) Ensuring compliance with all FCC Rules and Policies.

52. Mr. Schroeder has past broadcast experience as general manager and principal stockholder of WSWL(AM) since 1981 (Miracle Ex. 2; Tr. 447). He was an announcer at WNVY(AM), Pensacola, Florida in 1965. He was an

announcer at WBSR(AM), Pensacola, Florida from 1962 to 1964. He was an announcer at WMAK(AM), Nashville, Tennessee in 1962. He was an announcer at WKDA(AM), Nashville, Tennessee from 1960 to 1962. In 1961, he was an announcer at WATE(AM), Knoxville, Tennessee (Miracle Ex. 2).

53. Mr. Schroeder has resided within the community of license. Pensacola, Florida: from 1940 to 1959; from 1962 to 1972; and from 1979 to the present. From 1977 to 1979, he resided in Pensacola Beach, Florida, which is within the predicted 3.16 mV/m contour of the proposed station. Mr. Schroeder has lived in the service area for 44 of the last 52 years. Forty-two of these years have been spent living within the community of license.

54. Mr. Schroeder has been invOlved in civic activities within the proposed community of license and the proposed service area as follows: (Miracle Ex- 2)

- East Brent Baptist Church - member since 1990'.

- First Baptist Church - 1940-1959, 1977-1990-.

- Member - 1950-1959 and 1977-1990

- Sunday School teacher - 1977-1979

- Pensacola Chamber of Commerce - member since 1981 attended meetings, helped promote functions, attended functions;

- Optimists Club - not a member, sold Christmas trees, 1982-

1985, attended several meetings and functions, since 1981;
- waterfront Rescue Mission - supported since 1981 - helped raise funds, telephone solicitor, personally contributed funds. promoted a dog show to raise money. negotiated to secure transmitter for a South American short wave radio station for a missionary, donated appliance. clothing and cash, attended all (except two) banquets*.

- Loaves and Fishes Soup Kitchen - donated funds and solicited funds, 1981-1989;

- Invited to be guest speaker. encouraging young people not to use drugs, pick good friends, etc., at Longleaf Elementary School. Pensacola, 1991; Brentwood Middle School, Pensacola. 1990;

- Guest Speaker. Perdido Baptist Church. approximately 1987; Holy Cross Episcopal Church, approximately 1985; and Full Gospel Businessmen Fellowship Meeting. approximately 1982:

- Participated in right-to-life demonstration (Passive), 1991;

- New Hope Home - supported. since 1981. guest speaker, 1982;

- Waterfront Rescue Mission Chapel - guest speaker. 1984;

- Downtown Improvement Board - since 1988 - supported activities, attended functions, promoted activities; and

- Crippled Children's Home - entertained -children. 1990;

55. Auxiliary Power. Miracle proposes to install an auxiliary power source to insure the continuation of operations of the FM station in the event of an interruption of regular power (Miracle Ex. 5).

56. Daytimer Preference. Miracle is licensee and owner of daytime standard broadcast station WSWL(AM) (Formerly WPFA(AM)), Pensacola, Florida. Miracle has owned and operated WSWL(AM) continuously since 1981. Gerald Don Schroeder, Miracle's 100% voting stockholder, has devoted more than 20 hours per week to the operation of FCC 93D-19 WSW/UAM) since 1981. Miracle*s application in this proceeding was filed March 24. 1988: so Miracle was licensee of WSWL(AM) for more than three years prior to the filing of Miracle's*s application for a construction permit for the F.M station (Miracle Ex. 4).

57. In the event the construction permit in this proceeding is awarded to Miracle based on its comparative superiority after a comparative hearing. in which part of the comparative superiority was based upon the ownership of WSWL(AM). pursuant to the Commission's Daytimer Preference policy, Miracle will divest itself of WSWL(AM) within three years after the initiation of program tests by the FM station (Miracle Ex. 4).

Misrepresentation by Donovan and Subornation Issues

58. At the hearing session held October 29, 1991, John C. Donovan. Jr. ("Donovan") testified that as the broker of Donovan Realty of Alabama he handled the transaction regarding Miracle's transmitter site (Tr. 902). According to Donovan, Miracle signed a lease option agreement in March

of 1988 (Tr. 911). Mr. Schroeder delivered the first two payments (Tr. 916). and all other payments through April of 1990 were made by Levin (Tr. 915. 920). On April 25. 1990. Donovan sent a notice to Levin. with carbon copy to Mr. Schroeder (Floyd Ex. 14). indicating that the lease had expired on March 20. 1990 and requested that he get in touch with him. He got no response to the letter. Subsequently in the latter part of October of 1990, Donovan received telephone calls from attorney Christopher J. Holt and Mrs. McGreevy inquiring about the site (Tr. 930. 934-35). Although he did~ not get a response from Levin or Mr. Schroeder, Donovan did not place the property back on the market. nor did he place any signs on it (Tr. 930). When he got the inquiry about the property he called Levin to see what Miracle's intentions were regarding the site (Tr. 934). Levin requested that the contract be sent jr. 936). Donovan did so and in turn received the executed contract (Tr. 940).

59. Following the October 29. 1991. hearing session two individuals who owned land abutting Miracle's site submitted affidavits to the effect that the parcel of land in the fall of 1990 was available for purchase and that there were "For Sale" signs placed on the property. Hence the specified issues.

60. Subsequently. at the October 20. 1992 hearing session Mr. Schroeder testified that he had no knowledge of any "For Sale" signs being placed on Miracle's proposed site in 1990 (Miracle Ex. 10). He also denied having suggested to Donovan to testify a certain way (Id.). Levin testified that he had never seen Miracle's proposed site and that he at no time had any negotiations with Donovan (Miracle Ex. 11).

61. Donovan testified that when he called Levin to tell him

about Holt's inquiry, Levin merely requested that the sale contract be mailed to an address he specified (Tr. 934, 936). Donovan did state that in the interim following the expiration of the Miracle lease he encountered abutting owner. Joseph Michael Dewberry ("Dewberry"), on the proposed site and directed him to remove the deer stands Dewberry-had placed on the property (Tr. 1470). Donovan acknowledged that he may have informed Dewberry that the Miracle lease had expired jr. 1472), but also stated that he was not interested in doing business with Dewberry (Id.). Donovan thought that he may have also told the other abutting owner that the lease had expired jr. 1476). Donovan indicated that he had written to Levin following the expiration of the lease because he received no response to his letter sent to Mr. Schroeder and was aware that Levin had been sending the monthly checks on the lease (Tr. 1483).

62. Donovan stated further that he had done nothing to market the Miracle site, but allowed that his wife may have placed "For Sale" signs on the property (Tr. 1488). He alleged that he had never discussed this with his wife (Id.). However. having been confronted with his earlier declaration (PRP Ex. 10) that unknown to him his wife did place "For Sale" signs on the property he stated that he did speak with her and she thought that she may have placed the signs on the parcel Jr. 1486, 1488). Donovan averred that he signed the declaration based on his wife telling him that she had placed the "For Sale" signs. but that afterwards his wife told him that she wasn't sure about placing the "For Sale" signs Jr. 1488). At her deposition. Mrs. Donovan stated that she never told her husband that she put the signs on the property but that she did tell him that she wasn't really sure whether she placed the signs (Miracle Exs. 28. 29, 30. 34).

63. Dewberry testified that for some time he had an interest either in acquiring a portion of Miracle's proposed site in order to expand his adjacent parcel of land, or in acquiring it for others he knew to be interested in acquiring it. To those ends. he inquired of Donovan from time. to-time about the property Jr. 1588). Prior to the time the land was optioned to Miracle. Donovan told him that it was available (Tr. 1589). Thereafter. Dewberry became aware of Miracle*s lease/option in the course of a telephone conversation with Donovan which was thought by the witness to have occurred in 1989 (Id.). When Dewberry next encountered Donovan. Donovan directed him to remove deer stands that Dewberry had placed on the property. Donovan said that the stands impaired the value of the property which had become available again because Miracle's lease/option had been "dropped" Jr. 1590). Dewberry disfavors using the site as a location for a tower and has registered his dissatisfaction with local officials (Tr. 1-1591)

64. John Vaughn ("Vaughn") testified that he has known Donovan for many years jr. 1597) and*that he personally witnessed Mrs. Donovan. placing the "For Sale" signs on the property in early October of 1990 jr. 1598). He approached Mrs. Donovan who told him that the lease option had run out, that the land was available for sale. and that the price was negotiable (Tr. 1599). Vaughn asked Mrs. Donovan to provide him with written information on the property; the information appeared in his mailbox shortly thereafter (Id.; PRP Ex. 15). Vaughn also talked to Donovan about the property; he was told that Miracle had lost its lease and that the property was again available, but he couldn't say whether.the "For Sale" signs were up (Tr. 1602).

65. Attorney Holt testified that in October of 1990 he had contacted Mary Donovan, the reputed owner of the site. and John Donovan (Tr. 1543) and learned from Mary Donovan that she recognized the name of Levin and thought that a contact had been made by him jr. 1545) and that she believed that the lease on the parcel had expired (Tr. 1546). From John Donovan. Holt learned among other things that Levin told him that he was not in a position to renew the lease option because the FCC had not as yet granted the construction permit jr. 1550).

66. Following his first telephone conversation with Donovan, Holt prepared a rough draft of an affidavit (hat he intended to use in connection with a motion seeking a site issue against Miracle jr. 1561: PRP Ex. 12). He then placed another call to Donovan advising him that he intended to file such a motion and solicited Donovan's assistance in furnishing the requisite declaration (Tr. 1561). Donovan. without first considering the content of the declaration. refused. citing his desire to avoid angering Levin and his reluctance, in any event, to become involved (PRP Ex. 11).

Concealment of Documents Issue

67. The Joint Production Motion filed February 12, 1991 directed the production of the following documents:

Request No. (1) All documents that relate to the formation of the Applicant or to any of its successors. including but not limited to all documents that identify any person participating in such formation or that describe any proposed structure for the Applicant or any of its predecessors or successors, including * but not limited to telephone diaries. notes. records of

conversations or correspondence of principals evidencing contacts concerning the preparation or organization of the Applicant*s application, or correspondence relating thereto.

(2) All documents that relate to any meetings. formal or informal. of the Applicant. its partners, limited partners. officers. directors. stockholders. and any other-persons concerning the application or the proposed station. both preceding and following the filing of the Applicant's application.

(3) All documents reflecting any contacts or communications between or among the Applicant's principals regarding the formation or composition of the Applicant and the prosecution of its application.

(5) All documents that relate to any past, present or future plan or right of any person to purchase or otherwise acquire any interest or future interest in the Applicant (e.g., stock options. stock subscriptions or loan agreements that provide for the conversion of debt to equity: or the pledge of voting stock as security for a loan) and all documents that relate to any oral understanding that may result in a change of ownership of the Applicant.

(6) All documents that relate to the past, present. or future organizations, ownership, distribution of profits, management, or functioning of the Applicant or of any corporation or partnership that is a party to its application, including but not limited to limited partnership agreements. articles or certificates of incorporation, by-laws, shareholder agreements. proxies. partnership agreements. subscription agreements, stock certificates, and operational agreements, whether or not now in effect.

(7) All documents relating to the payment of any compensation, commission, benefits, bonus or consulting or management fees by the Applicant in the event his application is granted or a settlement agreement effectuated, and any documents relating to the management or operation of the proposed station. including the proposed existence of any consulting relationship. after grant of its application.

(10) All documents reflecting any contacts or communications by or between the Applicant or any of its principals and the owner or agent for the owner of the transmitter site specified in the applicant's application.

(13) Copies of all cancelled checks, receipts, ledgers, notes and other documents evidencing loans (whether contributions or funds to the Applicant whether directly or indirectly including loans. gifts or contributions of funds to principals for the purpose of underwriting any payment or future payment to the applicant) by any person, including checks evidencing payment of the Applicant's expenses.

68. By letter dated February 1. 1991, Levin advised Miracle's then FCC attorney Smithwick that he had reviewed the Motion and that he was instructing Mr. Schroeder to search his files for responsive documents (PRP Ex.18) Levin, an experienced trial attorney. also informed Smithwick that "if he [Schroederl has any trouble understanding [the document production request] I will go through it with him." (1d). Levin concluded by advising Smithwick that "we have no objection" to the documents requested (1d.). Miracle failed to produce a variety of documents, called for by the Joint production Motion.

69. Transmitter Size Documents. In response to a subpoena duces lecum served by the parties on Donovan, a variety of Miracle documents surfaced that revealed Levin's participation in transactions involving Miracle's proposed transmitter site. Those documents included: (a) a letter dated March 16. 1989. from Levin to Donovan with a copy to Mr. Schroeder (Floyd Ex. 13): (b) a letter dated April 25, 1990, from Donovan to Levin with a copy to Mr. Schroeder (Floyd Ex. 14): jc) a letter dated October 26. 1990. from Levin to Donovan (Floyd Ex. 16. Tr. 664): and (d) a letter dated October 31. 1990, from Donovan to Levin (Floyd Ex. 18). The foregoing documents were not produced by Miracle until after Donovan's records were subpoenaed bY Miracle's opponents (Tr. 644-45).

72. Anorne v Invoice Documents. The Joint Production Motion required Miracle to produce a variety of docu. ments concerning its corporate formation and collateralization. Miracle Ex. 19 contains an invoice dated May 9, 1988, on the stationery of Levin's law firm and addressed to "Mr. Gerald Don Schroeder. Radio Station WPFA, 4151 North Pace Blvd., Pensacola, Fl 32505." (Miracle Ex. 19. p. 24). Attached to that invoice is a "fees and costs sheet" dated May 20, 1988. and a copy of a check from Levin to his law firm in the amount of S61.19 (Miracle Ex. 19, p. 25). Neither the law firm invoice nor the related fees and costs sheet were ever produced by Miracle in response to the Joint Production Motion. Instead. they were first discovered when a subpoena duces tecum was served on the administrator of Levin's law firm after the conclusion of the first hearing session in this proceeding.

73. Mr. Schroeder claims that he cannot recall having received the invoice from Levin's law firm (Miracle Ex' 15 p.

2. ¶ 5). He asserts, if he had received it he simply would have sent it along to Levin because he never keeps copies of such documents (Id.; Tr. 1729, 1769). Mr. Schroeder further claims that if he had located the invoice and related materials in the course of document production, he "would have had no reason to believe this document was incriminating." (Miracle Ex. 15, p. 2. ¶6).

74. Levin concedes that he received the law firm invoice (prepared by one of his law firm's attorneys. Mr. Monroe) presumably after it was forwarded by Mr. Schroeder (Miracle Ex. 16. p. 3. T 9). He states that "no copy of the bill... was kept in the Miracle Radio riling cabinet," and that the invoice documents "were not found during the process of gathering documents for the document production." (Id.). Miracle offers no explanation for why the invoice documents were not produced from Monroe's files pursuant to the Joint Production Motion. which expressly directed the parties to furnish "all documents known or available to it or under its control, or reasonably available to its agents. . (PRP Ex. 17, p. 6). In his letter to Smithwick dated February 5, 1991,' Levin promised that he would have Monroe "send you a photocopy of his files on Miracle Radio..." (PRP Ex. 19). That letter indicates that a copy was sent to Monroe conveying these instructions (Id.; see Memorandum Opinion and Order, FCC 93M-91, released March 5, 1993).

75. On September 11, 1991, Floyd filed a "Motion to Compel Production of Documents" requesting the production of Monroe's attorney invoices.[4] Levin contends that the invoice and related documents requested by Floyd's September 11, 1991 Motion to Compel were not produced because the legal work that Monroe performed on Miracle's articles of incorpo-

ration. by laws, stock pledges, resignation of a corporate director. conferences with Mr. Schroeder and Smithwick, filings with the Florida Secretary of State. etc., "had [never been done by the law firm for Miracle Radio..." Instead. Levin asserts, ail such legal work was done for him personally (Miracle Ex. 16, P. 3. 110). This claim is confirmed, Levin avers, by the fact that he paid the fees and costs with his personal check (Id., p. 4,111).

76. Levin-Smithwick Letters. By memorandum, dated March 11, 1991 Miracle identified. inter atia, three alleg-1 edly privileged letters that Levin had written Smithwick in February of 1991 (PRP Ex. 15, p. 5). In asserting that privilege, Miracle represented to its opponents that each of the letters constituted a protected communication "provid. ing information to respond to discovery. which included confidential information." (Id.).

77. During the hearing session held on January 27, 1993, Levin testified that he was not certain whether he had ever corresponded with Smithwick Jr. 1632). But after being shown the applicant's March 11 memorandum, Levin conceded that Miracle had claimed attorney-client privile or '9 three letters that he had written (Id.). When asked Zeether the letters contained any confidential information, Levin opined that they probably did not. Instead. he characterized them as likely being transmittal letters (Tr. 1632-33). Consequently, he

[4] Floyd's Motion was denied as untimely filed by Memorandum Opinion and Order, FCC 91M-2917, released September 24, 1991. Despite the fact, Miracle avers in its direct written case that it read the motion and concluded that the Monroe invoice and related documents did not come within Floyd's motion (Miracle Ex. 16, p.3).

directed Miracle's counsel to produce the documents to the Court (Tr. 1719). Copies of those letter together with other documents not previously produce were subsequently made available to PRP, Floyd and AD See Memorandum Opinion and Order, FCC 93M-9,1-.'released March 5. 1993.

78. In the first transmittal letter from Levin Smithwick dated February 1, 1991. Levin recites: (a) t he had reviewed the Joint Production Motion; (b) that by copy of the letter he was instructing Mr. Schroeder review his files for responsive documents; and (c) that i "he [Schroeder) has any trouble understanding the 'document production request] I will go through it with him (PRP Ex. 18). Moreover, Levin instructed Smithwick concerning Miracle's position on the motion, informing him that "we have no objection" to the document request (Id.) In a transmittal letter from Levin to Smithwick dated February 5, 1991, Levin advised Smithwick that he would have Monroe send him "a photocopy of his files on Mir acle Radio." (PRP Ex. 19). The-letter also indicated on its face that a copy was being sent to Monroe to provide him with these instructions (Id.). In a letter from Levin to Smithwick dated February 19, 1991, Levin disclosed that he had been talking with "one of the other applicants would seek to attack his financial control over Miracle and his censure for ethical violations by the Supreme Court of Florida. Enclosed with the letter were materials that Levin thought would be useful in countering such a strategy (Id) Levin at hearing spontaneously agreed to release the documents because he voluntarily waived the former privilege "And so I waive it, and whoever has those letters if you would forward those on to the court, because I can assure you there was nothing more in there other than transmittal, and if there was, I want you to

have it because I am not trying to withhold anything." Miracle maintains that up until Levin waived the attorney-client privilege. the documents came within the protection of privilege.

79. The Security Documents. At the hearing session held on October 2, 1491, Mr. Schroeder testified that his financial arrangement with Levin was strictly a "handshake agreement." jr. 551). Upon cross-examination leading up to that claim, Mr. Schroeder testified that there was no promissory note executed jr. 549. 550).

80. After Mr. Schroeder's testimony during that initial hearing session, and in connection with the instant document concealment issue, the Presiding Judge granted PRP's First Motion for Production of Documents, filed October 15, 1991 (Memorandum Opinion and Order, FCC 92M1037, released November 6, 1992.) In its Motion, PRP had requested that Miracle examine the Joint Document Production Motion, and furnish any yet-unproduced documents which are responsive to that Motion. In response to PRP's Motion. Miracle represented through its counsel that it would conduct a complete review of the Joint Production Motion to ensure that it had complied with its obligations thereunder (Tr. 1648). No documents relating to Miracle's financial arrangement with Levin were subsequently produced.

81. During the hearing session held on January 27, 1993. Levin was examined by the parties concerning the corporate legal work that Monroe had performed on the applicant's behalf jr. 1635-1638). As a result of that examination, it was revealed for the first time that Mr. Schroeder's financial arrangement with Levin was more than simply the handshake agreement Mr. Schroeder had testified to. Specifically, it was

discovered that Mr. Schroeder had executed a demand Promissory Note and related Uniform Commercial Code ("UCC") security instruments to secure Levin's loans to the applicant (Tr. 1639-41. 1645-46. 1650. 1653). and that Miracle had not produced those financing documents to the other parties.

82. On February 4. 1993. after the record had been closed, Miracle produced for the first time the various security documents revealed during Levin's January 27 hearing testimony (Memorandum Opinion and Order, FCC 93M-145. released April 5. 1993). Those documents included:

(a) PRP Ex. 21, a Promissory Note dated September 1. 1991. in the amount of S365,000 and made payable upon demand to Levin;

(b) PRP Ex. 22, a Security Agreement dated September 1, 1991. together with a Corporate Certification dated September 26, 1991, in which Schroeder conveyed to Levin a security interest in all of Miracle's physical assets: and

(c) PRP Ex. 23, a UCC Financing Statement filed March 25, 1992, listing Miracle's physical assets held as collateral by Levin.

83. Attached to the Security Agreement is a Corporate Certification that was executed by Gail R. Schroeder in her capacity as secretary of Miracle and notarized by Levin on September 26. 1991 (PRP Ex. 22). That certification recites that a meeting was held by the Board of Directors of Miracle on August 21, 1991, at which time it was resolved is that all notes and other evidences of the debt of the Corporation to

Frederic G. Levin... shall be signed by Gerald Don Schroeder." (Id.).

84. Mr. Schroeder recalled Mr. Monroe having drawn up a UCC filing and a note (Tr. 1736. 1765). He did not keep a copy of it and had forgotten about it (Tr. 1738). Mr. Schroeder never thought of the documents in terms of the document production (Tr. 1765). Mr. Schroeder could not recall the date that the UCC statement or the note was signed (Tr. 1774).

85. During Mr. Levin's testimony, when asked about the basis of his protection regarding the loans he has made to Miracle Radio, Mr. Levin noted the existence of a UCC filing (Tr. 1639). Mr. Levin stated the "tilt was turned over to you all some time ago" and he assumed that it had been produced because it had been mentioned throughout the testimony Jr. 1639). Mr. Levin further stated that he did not understand what the UCC filing was beyond a lien against the equipment at the station Jr. 1640).

86. As they had done earlier with regard to Mr. Monroe . s representation of Mr. Levin. Mr. Levin asked Mr. Monroe to research the issue of a possible UCC filing on the basis of a "transfer of production" as compensation for Mr. Monroe's efforts (PRP Ex. 16). Mr. Monroe's work culminated in a note and the UCC filing Jr. 1646). Mr. Levin thought that the parties had known about the note and UCC filing for over a year and a half and did not believe that he was required to turn these items over Jr. 1646). The documents were produced by Miracle Radio shortly thereafter on February 4. 1993. (Stipulation accepted in Memorandum Opinion and Order, FCC 93M-145, released April 5. 1983.)

87. Additional Documents. The joint competitors claim that Miracle Radio concealed additional unidentified documents and claim that Miracle Radio is compelled to produce still more documents.

88. Captain C. Flack Logan is the Director of Administration for the law firm of Levin, Middlebrooks. Mabie, Thomas Mayes & Mitchell, P.A. (Miracle Ex. 18. P. 1. 11).

89. Captain Logan's first involvement with this proceeding occurred in connection with a subpoena that was issued to Levin, Middlebrooks to produce certain documents (Miracle Ex. 18, p. 1, 1 4). This subpoena called for records pertaining to Miracle as well as Mr. Monroe (Miracle Ex. 18, p. 1, 1 5). Captain Logan gathered the files containing the documents called for by the subpoena and was advised by Mr. Levin to turn them all over (Miracle Ex. 18, p. 1, 1 4). Captain Logan then proceeded to turn them over and this was accomplished, without any objection, on August 3, 1992 (Miracle Ex. 18, p. 1, 1 4).

90. Captain Logan was never told by any member of in. Middlebrooks or Miracle to hide or withhold any documents called for by the subpoena (Miracle Ex.18, P.1, ¶5). Captain Logan was not told that any documents had been previously held back (Miracle Ex. 18, p. 2, ¶5). The files were turned over in an "as is" condition (Miracle Ex. 18. p. 2, ¶5).

David Earl Hoxeng d/b/a kDX Communications
of Pensacola

91. ADX is an individual applicant (ADX Ex. I).

92. Diversification. David Earl Hoxeng has no attributable interest in any medium of mass communications. He is employed on a part-time basis for Station KTSA(AM) and KTEM(FM), San Antonio, Texas as marketing manager, and his wife is employed by Station KTEM as local...

105. Associates v. FCC, 939 F.2d 1035 (D.C. Cir. 1991). Here. Floyd provided no financial showing of his financial assets and' obligations. There is no way to determine to what extent Floyd had pre-existing or ongoing obligations that he had to meet.

106. The only assets Floyd timely committed to utilize to finance the construction and operation of his station were the net proceeds of the sale of his existing radio stations, Stations WORV(AM) and WIMG(FM). In order to validly rely on non-Liquid assets. it was necessary for him to have supported his reliance with a "valid appraisal." Opal Chapell, 4 FCC Rcd 1215 (1989). Rose Broadcasting Company, 68 FCC 2d 1242. 1246 n.9 (1978): Kaye-Smith Enterprises, 98 FCC 2d 675. 678. recon. denied, 98 FCC 2d 670 (Rev. Bd. 1984), review denied, FCC 85-192 (April 19. 1985). Moreover. because net proceeds received by a seller of non-liquid assets normally are less than fair market value. the Commission reduces market valuations by as much as one-third in analyzing their use in conjunction with an applicant*s claim to be financially qualified. Port Huron Family Radio, Inc., 5 FCC Rcd 4562 4563 n.5 (1990).

107. Floyd claims that he developed an estimate of the stations' fair market value with the assistance of counsel. This estimate. it is alleged. was based upon figures for comparable stations that had been reported in the trade press and discus-

sions of station values. Based on his discussions with counsel he believed that his stations could be determined by multiplying 9 or 10 times their cash flow or 3 times their gross earnings. However. this testimony has to be discredited because it is self-serving. Floyd did not provide testimony from a corroborating witness. The Commission has held that an applicant's self-serving testimony is not the probative evidence required to establish financial qualification. See Aspen F,%f. Inc., 6 FCC Rcd 1602 (1991): Janice Fay Surber, 5 FCC Rcd 6155, 6158 (1990): Mableton Broadcasting Co. Inc., 5 FCC Rcd 6314, 6317 (1990).

108. Floyd maintains that his pre-riling estimate of the stations' fair market value was supported by a professional appraiser. Ms. Harrison. However. Ms. Harrison specifically disclaimed Floyd's representation that she confirmed his belief of value of the stations.

109. Floyd secured an appraiser on the same day that he certified his financial qualification. However. Ms. Harrison's appraisal is not deemed reliable. She never inspected the station. No adjustments were made to consider the market size. the format, the number of persons served by the stations, its rating, or whether Floyd ever paid himself a salary. Floyd admitted that he does not take a salary and Ms. Harrison testified that knowing that fact itself would have reduced her value of the station. Floyd testified he would pay a station manager S200-S250 per week. Mr. Giddens established that many of these factors in fact affect fair market value of a radio station and felt the value must be reduced to take into account- the stations' format: the costs of replacing Mr. Floyd as general manager. chief engineer. and salesman; and the location of the stations. Also. Ms. Harrison failed to reduce

the value of the stations to reflect the amounts' that could be realized only from an all cash sale. Mr. Giddens felt that taking these factors into account required an overall valuation of only S200.000. Applying the formula the Commission established in Port Huron, supra, and reducing the value of the non-liquid asset by 20%, results in a determination that Floyd's non liquid assets that can be readily convertible to liquid assets only are in the range of S200.000'to S216,000, which falls short of his anticipated S260.527.14 budget.

110. In light of the foregoing. it is concluded that Floyd at no time actually had the reasonable assurance of adequate funds available to meet his projected costs of his proposed Pensacola station. The financial qualification issue specified against Floyd IS RESOLVED AGAINST Floyd.

111. However, the record does not support a finding of misrepresentation on Floyd's part. To finance his proposal, Floyd needed $260,527.14. He planned to rely on the sale of his two radio stations. Mr. Giddens estimated the value of the stations at S270,000 on terms. However, if a cash transaction were sought the value would be reduced by 20% to $216.000 (see Fndgs. 135, supra). The record does not show that Floyd was aware of the discount feature in estimating cash transactions. His appraiser certainly was not aware of it. He thought his two stations to be worth a lot more. There is no indication that in fact he believed otherwise. He did not wilfully withhold any information that he should have disclosed. He did not conceal anything from the Commission. Floyd indicated in his application that documentation was in progress. It was an honest mistake. On the day of his certification he was told that his estimate of value was confirmed and that an appraiser was retained to document it. It cannot be seriously main-

tained that his certification and his statement regarding documentation were lies. The record does not warrant it. Floyd is a Commission licensee of long standing with an unblemished record. The misrepresentation issue IS RESOLVED in his favor.

Site Availability

112. Floyd's original proposed transmitter site consisted prior to certification, of two parcels. The record shows that Floyd contacted the real estate agent who owned one parcel and who represented the owner of the other parcel. Terms were agreed upon and to make the agreement binding, Floyd was mailed real estate contracts for the parcels which were to be returned together with a good faith deposit. At the time Floyd filed his application the contracts were not signed by Floyd. Although Floyd did not have a binding agreement to acquire the proposed site, a binding agreement is not required. National Innovative Programming Network of the East.Coast, 2 FCC Rcd 5641, 5643 (1987). An applicant is required to reach a meeting of the minds resulting in some firm understanding as to the site's availability. Genesee Communications Inc., 3 FCC Rcd 3595 (1988). An indication by the owner that he has the intention to make the land available satisfies the "reasonable assurance" standard. Elijah Broadcasting Corp., 3 FCC Red 5148, 5150 (1988). Floyd has satisfied these requirements as is evidenced by the purchase contracts offered to him. The fact that Floyd did not finalize the deal is of no significance here since Floyd' changed- his site by an amendment as of right under 47 CFR Sec. 73.3522(a)(6) at which time he amended his proposal to specify his presently proposed site. The site availability and misrepresentation issues ARE RESOLVED in Floyd's favor.

113. Diversification. Floyd has proposed to divest himself of all his attributable broadcast interests.

114. Integration. Floyd has been found to be financially unqualified. Were it not so ruled, Floyd would have.been credited with 100% quantitative integration credit enhanced by his minority status and broadcast experience. Floyd has never lived in the proposed service area. but more than 25 years ago participated in some civic activities in the proposed service area: However, because of the significant time lapse no credit is given under this factor. Ruth Payne Carmen, 1 FCC Rcd 46 (1986).

Miracle Radio, Inc.

115. Diversification. Miracle. the licensee of WSWL(AM). Pensacola, Florida. has pledged to divest itself of all media interests. including WSWL(AM) prior to the initiation of program tests by the FM station. The pledge contains a proviso that should Miracle be awarded a daytimer preference then it will in accordance with Commission policy regarding daytimer preference divest itself of WSWL/AM) within three years after the initiation of program tests by the FM station. The pledge also contains a proviso that should Miracle be awarded a grant herein pursuant to a global settlement then its divesture commitment is inoperative. PRP and ADX contend that Miracle's pledge is contingent and therefore deficient under Commission precedent. However, Miracle's pledge is not deemed to be contingent. Under the Commission's Ruarch policy, the Commission permits applicants to withdraw divestiture and integration proposals in conjunction with settlement agreements filed up until the date

established for the exchange of exhibits in the case. After the exhibit exchange date. the successful applicant will be expected to fulfill its divestiture and integration proposal. See Memorandum Opinion and Order, FCC 91-154. released May 15, 1991, 6 FCC Rcd 3403 (1991). (Re: Reform of Comparative Hearing Process to Expedite the Resolution of Cases, General Docket No. 90-264.) By operation of Commission policy. therefore. Miracle*'s notice that it would withdraw its divesture proposal upon settlement has no significance since the exchange date of exhibits has long since passed.

116. Neither is Miracle's "two prong" proposal to divest deemed contingent. Its proposal is forthright and unequivocal. To deem the proposal contingent would place an applicant seeking a daytimer preference in a no win situation. For if an applicant seeking a daytimer preference only states that he will divest prior to going on the air. he would lose the three year grace period afforded by the granted preference. If the applicant seeking the daytimer preference would pledge to divest in accordance with Commission policy regarding daytimer preference and then fail to qualify, he would in final analysis be charged with a diversification demerit for not making an adequate divestiture pledge. This undesirable result could hardly be the Commission's intent. There is no question herein that Miracle intends to divest itself of WSWL(AM) in accordance with Commission policy and rules, if it wins a grant. Cf. Second Report and Order, FM Broadcast Assignment, 101 FCC 2d 638, n.18, p. 647 (1985).

117. Additionally, Mr. Levin and his wife have pledged to divest themselves of any interest in or connection with Blab Network, Inc. and Mr. Schroeder has pledged to terminate his cable television program prior to the initiation of pro-

gram tests.

118. In light of the foregoing, no diversification demerit will be assessed against Miracle.

119. Integration. Miracle is owned 75% by Schroeder (voting) and 25% by Mr. Levin (non-voting). Miracle claims 100% integration credit for the full-time participation of its sole voting stockholder, Mr. Schroeder. The record, however, discloses substantial involvement of Mr. Levin in corporate affairs and as a result, Miracle is entitled t:) receive only 75% quantitative integration credit for Mr. Schroeder's timely filed proposal Of full-time participation.

120. With respect to the existing station owned by Miracle, Mr. Schroeder discussed how the station is doing with Mr. Levin. and discussed the change in the existing station's format and site change with Mr. Levin prior to their undertaking. With respect to the proposed FM station Mr. Schroeder keeps Mr. Levin informed about the status (the application. told him of the designation of the case of the hearing, told him how many applicants are involved in the hearing, told him that issues were enlarged against a competitor and kept him informed concerning Miracle's over. all standing in the case. Mr. Levin's law firm filed Miracle*s corporate amendment with the State of Florida, and his firm's secretary typed up Miracle's corporate resolution. Mr. Levin also was present at the Special Stockholders Meeting. When Miracle entered into an option agreement with Donovan Realty for a site known as Deer Pine Acres, Mr. Levin directly made the payment for the initial option to purchase in 1988. made another payment in the Fall of 1990. and directly paid for the renewal of the option for land on behalf of Miracle. stating to the realtor in a letter that he "represents Miracle."

Mr. Levin has been involved in conference calls with FCC legal counsel as well as corresponding with him regarding discovery. Additionally, the record is clear that Mr. Levin personally pays Miracle's financial obligations. Miracle's bills are sent directly to Mr. Levin. and Mr. Levin writes the checks directly to the payees. Due to this ongoing activity on part of Mr. Levin. based upon Commission precedent, Miracle is entitled only to quantitative integration credit equal to the amount of equity in Miracle that Mr. Schroeder owns, namely 75%. See Royce International Broadcasting, 5 FCC Rcd 7063. 7064 19 (1990). Richardson Broadcasting Group, 7 FCC Rcd 1583 (1992); Rancho Mirago Radio. 7 FCC Rcd 480 (1992). Furthermore, the Commission has held that the provision of legal service by a "passive investor vitiates the protection normally afforded such investors under its attribution policies." Magdalene Gunder Partnership, 6 FCC Rcd 5976 (1991); Washoe Shoshone Broadcasting, 3 FCC Rcd 3948 (1988). rev. denied, 5 FCC Rcd 5561 (1990). As noted above, Mr. Levin advised a realtor that he represents Miracle.

121. Miracle has proposed that should it be awarded a daytimer preference, Mr. Schroeder will devote no more than 20 hours per week at WSWL(AM) and a minimum of 40 hours per week at the FM station. Although Floyd believes that the 20 hour weekly commitment for WSWL jeopardizes the integration commitment for the proposed FM station, a 60 hour per week range is deemed acceptable by the Commission. PRP argues that Mr. Schroeder has not set any cut-off date for his 20 hour weekly commitment and presumable he could work at the WSWL Station after it is sold. It is unrealistic to maintain that Mr. Schroeder would be offered a 20 hour a week position by the new owner even if Mr. Schroeder were inclined to continue to work there.

122. Miracle's proposal is enhanced by Mr. Schroeder's long-term residence, his civic participation and broadcast experience.

123. Daytimer Preference. In order to receive a daytimer preference, the daytime-only licensee must meet five prerequisites: (1) the applicant must have had at least 20 hours per week in the management of the daytime-only station; (2) the daytime licensee must be applying for a FM allotment in the same community of license as its AM station: (3) the applicant must propose to be integrated into the operation of the FM station; (4) the applicant must own the daytime-only station for three continuous years prior to designation of the hearing for the FM channel: and (5) the applicant must pledge to divest the daytime-only facility within three years from commencement of program test authority on the FM station. Second Report and Order, FM Broadcast Assignment, 101 FCC 2d 638, 645-647 (1985). The record shows that Miracle meets every one of the criteria. The-daytimer preference is equal in weight to local residence.

Misrepresentation by Donovan and Subornation Issues

124. The record reflects that PRP, Floyd and ADX ("Joint Petitioners"). believing that with the expiration of the Miracle lease option. Miracle*s reasonable assurance of site availability was automatically cancelled. tried to show that the Miracle principals, believing likewise. induced Donovan to lie about putting the site parcel back on the market. However. at this stage the Joint Petitioners admit that there is no direct evidence that Miracle's principals conspired with Donovan to elicit false testimony. Rather they charge that Miracle lacked

candor in not refuting Donovan*s unsolicited lies.

125. Fact is. that even if Donovan were marketing the parcel in the interim following the expiration of the lease option. that fact would not of itself cancel his previously rendered assurance of site availability. The record is devoid of any evidence that Donovan negotiated the sale of the proposed site with any one other than Miracle. In fact the record is clear that Donovan treated Miracle as given it a first right of refusal. After attorney Holt called Donovan. posing as an agent for a potential buyer. Donovan immediately got in touch with Miracle. In short. Miracle*s proposed Site was at all times available to it at the terms specified in the lease.

126. Donovan stated that he did not place the parcel back on the market or place "For Sale" signs on it. There is no record evidence that refutes this. Although witnesses Dewberry and Vaughn averred to seeing "For Sale" signs. it appears that they were placed there by Mrs. Donovan without Donovan's prior approval. Furthermore. the property was at no time available to Dewberry and it was not available to Vaughn at the price he wanted to pay. Incidently. Vaughn was not sure when he saw the "For Sale" signs. The fact that Donovan gave attorney Holt some information does not constitute an abrogation of the previously rendered assurance of site availability to Miracle.

127. Mr. Schroeder and Levin were unaware of any sign being placed on the proposed site. There is no record evidence that either of them believed that the property was no longer available to them after the expiration of the lease. There is no record evidence that Donovan would not have given Miracle the right of first refusal for the purchase of the property. The issue IS RESOLVED in Miracle's favor.

Document Concealment

128. Except for the Levin to Donovan letter all of the documents about which the Joint Petitioners complain have been produced by Miracle. That Miracle may have produced them late is not enough to establish actionable concealment. Inadvertence. carelessness and mistakes of law must be differentiated from an intent to deceive. (Gary D. Terrell, 59 RR 2d 1452. 1454 (Rev. Bd. 1985)). Evidence of carelessness. mistakes, inadvertence and eve n slipshoddiness has long been held not to amount to an intent to deceive. (Bluegrass Broadcasting Co., 43 FCC 2d 990, 993 (1973): Hampshire County Broadcasting Co. Inc., 99 FCC 2d 600. 603 (Rev. Bd. 1984)).

129. Transmitter Size Document. At the time that the letter to Donovan was written. Levin*s secretary was a temporary secretary who had responsibility for keeping separate files on all of Levin's ventures. Levin alleges that his secretary misfiled the transmitter site option and the accompanying letter in his personal files which concerned property matters. Levin's testimony concerning the misfiling is corroborated by Levin's regular secretary who subsequently discovered the letter in the wrong file. At the time of the document production request Levin requested his regular secretary to search through the files and retrieve all of the relevant documents. The letter was not found during this process. Even though the letter proved to be incriminating of Levin*s non-passivity, there is no evidence that Levin intended to conceal the letter. Levin being a noted trial attorney surely was aware that the letter to Donovan could have been reached. as it was. from Donovan's files.

130. Attorney Invoice Documents. Following the completion of legal work performed at the request of Mr. Levin. Monroe sent a bill for his services to Mr. Schroeder. Monore had stewardship over the documents produced in connection with his work and Levin directed Monore to produce documents in his files. The invoice was not produced timely. Mr. Schroeder testified that it is his practice to keep only important papers and to forward bills to Levin for payment. Mr. Schroeder alleges that whatever documents he had in his possession, he turned over to his communications attorney. It develops that the invoice was not initially produced because it was believed that it had no connection to Miracle Radio.

131. Levin Smithwick Letters. Three letters were not produced because they were deemed to be privileged. At the hearing Levin waived the privilege and agreed to release the documents. The Joint Petitioners argue that Levin stated at the hearing that he believed the documents not to include confidential matter. But that clearly does not pertain to the third letter. Fact is. Miracle did not intend to conceal these documents but voluntarily produced them.

132. Security Documents. As noted above, Mr. Schroeder at the hearing recalled that Monroe had drawn up a UCC filing and a promissory note but he did not keep a copy and had forgotten about it. Mr. Schroeder could not recall the date that the UCC statement or note was signed. It was Levin who at the hearing dis7closed the existence of the UCC filing. He believed that it had been duly exchanged previously but believed that it had no other relevance than being a lien against radio station equipment. The security documents were supplied after the close of the hearing. but by Memorandum Opinion and Order. FCC 93M-145. released April 5. 1993.

were incorporated into the record.

133. Additional Documents. The Joint Petitioners have not made an adequate showing of any documents still being extant. The record shows that-the Director of Administration for the law firm of Levin. Middlebrooks. Mabie, Thomas Mayes & Mitchell turned all documents he found in an "as is" condition.

134. From the foregoing explanations it is clear: that there was no intent to conceal. The explanations given are deemed plausible. There is no evidence to compel a contrary ruling. The testimony of Levin and Mr. Schroeder is accepted as credible. In light of the foregoing ;and in view of Miracle's unblemished record as a Commission licensee the issue IS RESOLVED in Miracle's favor.

ADX Communications of Pensacola

135. Diversification. ADX has not own any attributable broadcast interests. ADX is not assessed a diversification demerit.

136. Integration. ADX has not proposed integration in this proceeding. ADX does not receive a preference under this factor.

Auxiliary Power

137. All applicants have proposed to install auxiliary power facilities.

Comparative Coverage

138. Where the areas and populations within the applicants' proposed coverage arm are already well-served. the Commission has awarded a slight coverage preference only to

those applicants proposing substantially greater overall coverage than their competitors. See Simon Geller, 90 FCC 2d 250. 268-69, 276 (1982). where a slight preference was awarded to an applicant proposing to serve four times more area and 315.000 more people than its competitor. For less ' significant differences. a very slight preference has been awarded. See. e.g., Barton Broadcasting Co., 104 FCC 2d 785. 791 (Rev. Bd. 1986), where a very slight preference was awarded to an applicant proposing to serve 44.215 or 27% more people. Where the differences are insignificant. no preference is awarded. See, Metro Broadcasting. 99 FCC 2d 688. 699 (1989).

139. Here, the differences between Floyd, who provides the greatest service and PRP (43.164 persons or 12%) and ADX (38,885 persons or 10%) are sufficient to warrant giving Floyd a very slight preference as to PRP and ADX However. the remaining differences among the applicants. which in no case amount to more than a differential of 21.654 persons or 6%. are too insubstantial to warrant award of any preference.

Ultimate Conclusions of Law

140. Floyd has been found. to be financially unqualified ADX proposes no integration into management. Miracle has been awarded 75% integration credit. PRP has been awarded 100% integration credit. The difference in the integration credit given is 25% which by Commission precedent is decisive. No amount of enhancement awarded to Miracle could offset PRP's integration superiority. See, The New Continental Broadcasting Company, 50 RR 2d 1117, 1133

(Rev. Bd. 1981). PRP is clearly the winner. PR.P is best suited to be a Commission licensee.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commissi-on reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Pensacola Radio Partners (File No. BPH-880323MJ) IS GRANTED. and the applications of Vernon C. Floyd (File No. BPH-880324MK): Miracle Radio. Inc. (File No' BPH880324NU): and David Earl Hoxeng d/b/a ADX Communications of Pensacola (File No. BPH-8803240j) ARE DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

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[6] In the event exception are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to

Rule 1.276(d).

APPENDIX E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	MM DOCKET NO. 90-406
PENSACOLA RADIO PARTNERS	File No. BPH-880323MJ
VERNON C. FLOYD	File No. BPH-880324MK
MIRACLE RADIO, INC.	File No. BPH-880324NU
DAVID EARL HOXENG d/b/a ADX COMMUNICATIONS OF PENSACOLA	File No. BPH-8803240J

For Construction Permit for a
New FY Station on Channel 254C2
in Pensacola, Florida

MEMORANDUM OPINION AND ORDER

Issued: December 18, 1991 Released: December 23, 1991

1 . Under consideration are the following:

Pensacola Radio Partners' Motion to Enlarge the Issues Against Yr. Vernon C. Floyd, filed November 1, 1991;

Motion to Enlarge Issues, filed November 1, 1991, by Miracle Radio, Inc. ("Miracle");

Erratum, filed November 4, 1991, by Pensacola Radio Partners ("PRP");

Consolidated Opposition to Motions to Enlarge, filed November 22, 1991, by Vernon C. Floyd ("Floyd");
Erratum, filed November 25, 1991, by Floyd;

Letter, dated November 26, 1991, from Floyd; and

Pensacola Radio Partners and Miracle Radio, Inc. Joint Reply to Mr. Vernon Floyd's Opposition to Motion to Enlarge the Issues, filed December 12, 1991.

2. PRP and Miracle plead with adequate specificity that a financial qualification issue and attendant false certification issue be specified against Floyd.

3. It appears that Floyd intended to finance the proposed Pensacola station by selling both of his Hattiesburg, Mississippi stations which he owned .free and clear. Movants argue that Floyd's certification was not validly made because the appraisal of Floyd's Hattiesburg stations was not solicited, let alone made, until after floyd's certification.

4. Floyd responds that when he certified his financial qualification he knew how much his stations were worth and because he did not have a written appraisal in hand he qualified his certification with a statement indicating that he was in the process of assembling financial documentation to support his certification.

5. The movants maintain that central to Floyd's financial qualification and certification is whether Floyd relied on the opinion of the appraiser Who furnished the appraisal.

6. The requested issues will be added. Movants have raised cues ions of decisionally significant facts which must be

resolved at hearing.

Accordingly, IT IS ORDERED that Pensacola Radio Partners' Motion to Enlarge the Issues Against Mr. Vernon C. Floyd, filed November 1, 1991 and Motion to Enlarge Issues, filed November 1, 1991, by Miracle Radio, Inc. ARE-GRANTED, and the issues against Floyd are specified as follows:[1]

(1) To determine whether Vernon C. Floyd was financially qualified at the time he certified his financial qualifications;

(2) To determine whether Vernon C. Floyd misrepresented facts or lacked candor in certifying his financial qualifications; and

(3) To determine in light of the evidence adduced under issues 1 and 2, whether Vernon C. Floyd is qualified to be Commission licensee.

The issues will be tried at the session presently set for February 10, 1992. Exhibits will be filed January 27, 1992 and notifications of witnesses desired for cross-examination will be hand served on February 3, 1992.

FEDERAL COMMUNICATION COMMISSION

/s/ John M. Frysiak
John M. Frysiak
Administrative Law Judge

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[1] Miracle's charge that Floyd is not presently financially qualified is based on speculation.

APPENDIX F

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	MM DOCKET NO. 90-406
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DAVID EARL HOXENG d/b/a ADX COMMUNICATIONS OF PENSACOLA	File No. BPH-8803240J

For Construction Permit for a
New FY Station on Channel 254C2
in Pensacola, Florida

ORDER

Adopted: April 22, 1996; Released: May 3,1996

By the Review Board: MARINO (Chairman) and GREENE.

1. By letter. dated March 28. 1994, the Board informally referred the instant case to the Chief Administrative Law Judge for the appointment of a settlement judge, pursuant to the Commission's Public Notice, FCC 94-41, dated February 25, 1994 ("FCC Freezes Comparative Proceedings"). See also News Release of March 25. 1994 noting that the Board retained jurisdiction over the proceeding and would act on any settlement that was submitted consistent with the Commission's current policies governing such settlements.

2. Subsequently on January 23, 1996, the Commission announced its decision to eliminate the Review Board, which will become effective April 24, 1996. Order, 11 FCC Rcd 1062 (1996); Public Notice, dated April 24, 1996.

3. ACCORDINGLY, IT IS ORDERED, That final jurisdiction over this case IS CERTIFIED to the Commission consistent with its prior Order.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

APPENDIX G

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	MM DOCKET NO. 90-406
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DAVID EARL HOXENG d/b/a ADX COMMUNICATIONS OF PENSACOLA	File No. BPH-8803240J

For Construction Permit for a
New FY Station on Channel 254C2
in Pensacola, Florida

ORDER

ADOPTED: APRIL 30, 1998 Released: May 12, 1998

1. This Order grants a Joint Motion for Approval of Settlement Agreements and Dismissal of Applications filed October 20, 1997 by ADX Communications of Pensacola ("ADX"), Miracle Radio, Inc. ("Miracle"), and Pensacola Radio Partners ("PRP"), and affirms the denial of the application of Vernon C. Floyd for lack of financial qualifications. The Joint Motion contemplates a resolution of this proceeding whereby Miracle and PRP would dismiss their applications in exchange for monetary consideration from ADX, and ADX's application would be granted.

I. BACKGROUND

2. This proceeding involves applications for a new FM broadcast station in Pensacola, Florida. In an Initial Decision ("I.D."), Pensacola Radio P ers. 8 FCC Rcd 7225 (ALJ 1993), Administrative Law Judge John M. Frysiak ("ALJ) found that Floyd was financially disqualified and that, among the remaining applicants, PRP was comparatively superior. After exceptions were filed with the Review Board, the proceeding was frozen by the Commission's Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), in light of the decision of the court of appeals in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993), holding that the integration of ownership criterion used by the Commission to decide among competing applicants was unlawful. Although not made the subject of an express condition, the settlement agreements recognize that Floyd's application would have to be denied in a final Commission order before ADX's application can be granted pursuant to the Joint Motion.[1] This understanding comports with current Commission freeze policy because affirmance of Floyd's disqualification would allow for termination of the proceeding under the proposed settlement. See Modification of FCC Comparative Proceeding Freeze Policy, 9 FCC Rcd 6689 (1994) (Commission will adjudicate basic qualification issues in frozen cases only where proposed settlement of proceeding is contingent on such issue resolution).

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[1]See Mass Media Bureau Comments on Joint Motion at 2 n. 1.

II. DISCUSSION

A. Qualification of Floyd

3. After review of the record below, we agree with the I.D.'s disqualification of Floyd.[2] Floyd is the licensee and sole proprietor of radio stations WORV(AM) and WJMG(FM), Hattiesburg, Mississippi. Floyd certified in his application that he had net liquid assets on hand to meet his costs and indicated that he was in the process of assembling documentation of the availability of those assets.[3] In response to a motion filed by PRP and Miracle, the ALJ enlarged the hearing issues to determine whether Floyd was financially qualified at the time he certified his financial qualifications. See Pensacola Radio Partners, 8 FCC Rcd at 7225 15. At hearing, Floyd estimated his costs of construction and three months of operation at $260,527 and proposed to meet these costs primarily from the proceeds of the sale of his radio stations. Floyd developed his own estimate of the stations' fair market value, but the ALJ rejected Floyd's estimate because it was uncorroborated. 8 FCC Rcd at 7228 126 and 7237 1107. Floyd also relied on a formal appraisal of the stations' value by Susan Harrison, a communications consultant, whom Floyd retained on the day he signed the certification, but whose appraisal was not prepared until months later. The ALJ

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[2]Upon elimination of the Board, effective April 24, 1996, this proceeding was certified to the Commission. See Pensacola Radio Partners, 11 FCC Rcd 5256 (Rev. Bd. 1996).

[3] At the time Floyd filed his application, the Commission permitted applicants simply to certify, rather than to document, their financial qualifications. -See Revision of Form 301, 50 R.R.2d 381, 382 (1981).

concluded, however, that Harrison's appraisal was unreliable. The ALJ noted that Harrison never inspected the stations and did not take account of such important factors as market size, program format, service area, ratings, staffing, and whether Floyd paid himself a salary. She also did not reduce the value of the stations to reflect the 20% or greater discount typically available in cash transactions. Id. at 7229 U30-31 and 7237 1109. Instead, the ALJ accepted the appraisal provided by Charles Giddens, president of Media Venture Partners, a brokerage, appraisal, and analysis firm, which was the largest broadcast transaction mergers and acquisition business at the time of the hearing. Giddens took into account pertinent factors lacking in the Harrison appraisal. The firm had conducted several hundred appraisals, and Giddens, a broadcast station owner, had considerable personal experience in appraising broadcast properties. He had also spoken at broadcast industry functions on the methodology and mechanics of broadcast station evaluation. Giddens estimated that a cash transaction would produce in the range of $200,000 to $216,000 for Floyd's stations. Id. at 7229 132-33, 35 and 7237 1109.

4. Although Floyd also attempted to establish his financial qualifications by placing reliance on cash on hand in his personal savings and checking accounts and his stations' checking account, which totaled $143,000, the ALJ declined to consider this evidence. The ALJ pointed out that Floyd's deposition testimony only stated that he planned to rely on "proceeds from the existing stations" to finance the proposal and did not mention the use of cash on hand. -Id. at 7228 128; tr. 1182-83. In addition, the ALJ found that Floyd provided no showing of his financial assets and liabilities to support his

ability to meet his commitment. 8 FCC Rcd at 7236-37¶105.

5. In adopting the certification procedure, the Commission emphasized that it was not modifying its basic substantive financial requirements or changing the factual basis for meeting those requirements. See Revision of Form 201, 50 R.R.2d at 382; Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301, 4 FCC Rcd 3853, 3858 (1989). To establish reasonable assurance of financial qualifications at the time of certification, an applicant "must provide substantial and reliable evidence" of sufficient net liquid assets on hand, or committed sources of funds. Northampton Media Associates, 4 FCC Rcd 5517, 5519 (1989). recon. denied, 5 FCC Rcd 3075 (1990); affd, Northhampton2ton Media Associates v. FCC, 941 F.2d 1214 (D.C. Cir. 1991). The Commission requires "probative evidence" of financial ability, and reliance on the self-serving, uncorroborated statement of the person responsible for certifying the applicant's financial qualifications that he "took the appropriate steps" to secure the needed funds is not sufficient. Id.; AERen FM, Inc., 6 FCC Rcd 1602, 1603 (1991). Where the funding source is an individual, rather than a financial institution, the applicant must provide evidence, such as a balance sheet or financial statement, that its source had sufficient net liquid assets at the time of certification to provide the funds. No northampton, 4 FCC Rcd at 5519; Short Broadcasting Co., Inc., 8 FCC Rcd 5574, 5576 (Rev. Bd. 1993). It is well established that these standards apply to all applicants utilizing the financial certification process. See Mission Broadcasting &Corp. v. FCC, 113 F.3d 254, 260 (D.C. Cir. 1997) (rejecting claim that Commission failed to give adequate notice of its financial requirements).

6. Moreover, although not directly applicable to Floyd, it

is noteworthy that the Commission has more recently strengthened the certification process by amending Form 301 to require that applicants submit additional information about their financial qualifications and, as it did prior to certification, the Commission now requires that applicants have their underlying documentation verifying their funding on line at the time they submit their applications. "We stress that when the applicant checks the box on Form 301 that it is financially qualified, it must have at that time sufficient liquid assets in excess of current liabilities and/or sufficient funds available from committed sources to construct and operate the facility." Revision of Application for Construction Permit for Commercial Broadcast Station, 4 FCC Rcd at 3859. To provide guidance to applicants on the funding information required, the Commission added to its current instructions for Form 301 the instructions it formerly used to elicit financial information and documentation. "Pursuant to these instructions, documentation that establishes an applicant's financial qualifications- includes . . . a balance sheet of the applicant; . . . [and] financial statements for all persons who agreed to furnish funds . - - ." Id. at 3859 n. 68. Balance sheets and financial statements must be detailed. Id. at 3864 (Instructions for Section III - Financial Qualifications).

7. In his exceptions, Floyd principally argues that the ALJ erred in refusing to consider Floyd's testimony that he would use his personal funds to finance the station. We disagree. As the AIJ concluded, Floyd could not place reliance on his personal funds because Floyd simply failed to provide a balance sheet or other documentary evidence establishing that he had sufficient net liquidity at the time of certification to furnish the needed funds -For example, although Floyd relies, in part, on his stations' bank account, he did not docu-

mented stations' current liabilities including pre-existing or ongoing expenses such as salaries, taxes, and the costs of litigating this proceeding. Likewise, with regard to cash in his personal bank accounts, Floyd made no showing of his financial assets and liabilities, which would permit an independent determination of his net liquidity.

8. Floyd maintains, however, that he established the necessary liquidity to meet Commission requirements by virtue of his unchallenged testimony that he had no outstanding debts. In this regard, Floyd claims that, because he is an individual applicant not relying on third party funding who is familiar with his own assets and intentions, his testimony should be accepted as sufficient to establish his financial qualifications. We disagree that Floyd's showing satisfies Commission standards. First, Floyd cites no cases where we have held that the Northhampton standards summarized in ¶5, supra, are inapplicable to individual applicants relying on their own funds. As indicated, the requirement for documentation of financial wherewithal including a showing of sufficient liquid assets in excess of current liabilities has been a continuing staple of the Commission's financial qualifications standards both before and since certification was instituted. Certification did not change the Commission's substantive or evidentiary requirements. Second, Floyd's hearing exhibit is insufficient to prove that he is in the financial position he claims for himself Although Floyd claims that he owns all his assets "free and clear" of any debt, his exhibit mentions specifically only Floyds "home, other investment properties, and the stations." [4]Because Floyd is arguing that, in effect, his

[4]Floyd Phase II, Exh. 1, page 4 17. Although Floyd also refers to his hearing testimony, the transcript citations in his excep-

tions do not support his contention.
testimony should be accepted as tantamount to a balance sheet, we believe he was obliged to provide in his testimony the same level of detail as would appear on a financial statement m ent In fact, however, Floyd's exhibit makes only a single passing reference to the status of certain assets, and does not porport to make a complete showing of all of his liabilities. The Commission requires objective verification that an applicant has the funding it claims to have. See Sunshine Broadcasting, Inc. 6 FCC Rcd 5981, 5982-83 (Rev. Bd. 1991), recon. denied, 7 FCC Rcd 493 (Rev. Bd. 1992) (testimony that individual lenders had sufficient cash in bank accounts, absent documentation in form of financial statements showing net liquid assets, not sufficient to establish financial qualifications). In the absence of a balance sheet or other documentation, and because his testimony was not sufficiently detailed to show that he owned all his assets outright or to describe all his liabilities, Floyd's bank statements alone were not enough to establish that be "had the necessary financial resources at [the] time" of certification to construct and operate the proposed station. See Northampton, 4 FCC Red at 5519.

9. We also disagree with Floyd that the ALJ should have accepted Floyd's uncorroborated, self-serving opinion of the market value of his Hattiesburg stations to establish his financial qualifications. Although Floyd argues that his own valuation was reasonable and made in good faith (Exceptions, at pp. 14-16), Commission precedent is clear that an applicant who seeks to rely on the proceeds from the sale of non-liquid assets as a source of funds must provide a valid appraisal of the value of those assets at the time of certification. See Rose Broadcasting Co. 68 FCC 2d 1242, 1246 (1978); Capitol City

Broadcasting Co. 9 FCC Red 7861, 7863 (Rev. Bd. 1994), rev. denied, 10 FCC Red 3197 (1995), Aff'd by judgement No. 96-1481 (D.C. Cir. November 3, 1997) (applicant's self-serving self-appraisal of non-liquid assets rejected in absence of independent appraisals establishing Property values at time of certification); see also CHM Broadcasting L.P. v FCC, 24 F.3d 1453, 1458 & n_3 (D.C. Cir. 1994) (Commission practice of requiring objective evidence to support claim of sufficient financial ability is reasonable). Floyd cannot look to Harrison for confirmation of his own valuation because, as the AIJ found, Harrison's estimate did not consider pertinent information affecting the stations' fair market value. The only evidence in the record of a valid independent appraisal of the value of Floyd's stations is that provided by Giddens, an experienced appraiser, who estimated the likely proceeds of a sale as at most between $200,000 and $216,000, after adjusting the market value to take account of such relevant factors as station format, location, salaries, and the discount feature in cash transactions. See Port Huron Family Radio, Inc.,5 FCC Red 4562, 4563 n. 5(1990) (Commission practice is to reduce market valuation by as much as 1/3 because net proceeds from non-liquid assets are normally less than fair market value). Floyd does not specifically exempt to the ALJ's acceptance of Gidden's appraisal, which Floyd characterizes as a "reasonable estimate" (Exceptions, at p. 18) and the ALJ correctly concluded that, based on Gidden's estimate, the record established that the likely proceeds from a station sale alone would be insufficient to meet Floyd's anticipated costs. Floyd is not financially qualified.

B. Settlement Agreement

10. In opposing the Joint Motion, Floyd argues that the set-

tlement differs from those recently approved by the Commission in Global Information Technologies, Inc., 12 FCC Rcd 11808 (1997), and Gonzalez Broadcasting., Inc., 12 FCC Rcd 12253 (1997), because the non-settling parties in those cases already had their exceptions ruled on by the Board, and those settlements were expressly contingent upon dismissal of the non-settling parties. Floyd also contends that, in view of Section 3002(a)(3) of the Balanced Budget Act of 1997 ("Balanced Budget Act"), Pub. L. No. 105-33, 111 Stat. 251 (1997), expressing Congressional policy favoring competitive bidding for broadcast spectrum, it would be in the public interest to permit Floyd to participate in an auction for the Pensacola station. An auction would also accelerate the delivery of broadcast service, Floyd maintains. In this regard, Floyd adds that the agreement between ADX and Miracle runs counter to public policy because it provides, if the Commission does not approve the agreement, that ADX will not participate in an auction, thereby reducing the field of potential bidders.

11. The Joint Motion complies with the provisions of 47 U.S.C. §311(c) and 47 C.F.R. §73.3525(a) governing settlement agreements. The applicants have provided declarations under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement, and that approval of the agreements will serve the public interest by expediting the commencement of a new broadcast service in Pensacola, Florida. The amount of the payment to be made by ADX to Miracle and PRP is of no consequence inasmuch as Congress in the Balanced Budget Act has directed the Commission to waive any provision of our rules necessary to allow for settlement of frozen comparative hearing cases. See 112, infra; Gonzales Broadcasting Inc., 12 FCC

Rcd at 12255-56 §10. Floyd's objection to the settlement on the ground that, unlike recent cases, he has not had Commission review of his exceptions is answered by our affirmance of the I.D.'s denial of his application under the financial qualifications issue. Also, as in those cases, because the agreements are, in effect, contingent upon Commission denial of Floyd's application, they allow for a final resolution of this proceeding.

12. We also see no inconsistency between approval of the settlement and Section 3002(a)(3) of the Balanced Budget Act. Section 3002(a)(3) added Section 309(l) to the Communications Act of 1934. Section 309(l) authorizes the Commission to conduct competitive bidding proceedings with respect to competing applications for construction permits for new commercial broadcast stations that were filed before July 1, 1997. Section 309(l) also provides that, for a 180-day period, the Commission "shall waive any provisions of its regulations necessary" to permit these applicants to enter into settlement agreements. Thus, the statute clearly provides a 180-day window for applicants who filed before July 1, 1997 to voluntarily remove the conflict between their applications and encourages settlement through its waiver mandate. The settling parties have acted within the statutory framework. Contrary to Floyd's assertion, approval of the settlement will expedite broadcast service to Pensacola without the need for an auction. Finally, the provision of the agreement between ADX and Miracle pertaining to ADX's participation in an auction is of no effect in light of our approval of the settlement.

III. ORDERING CLAUSE

13. ACCORDINGLY, IT IS ORDERED, That the Joint Motion for Approval of Settlement Agreements and Dismissal of Applications filed October 20, 1997 by ADX Communications of Pensacola, Miracle Radio, Inc., and Pensacola Radio Partners IS GRANTED and the attached settlement agreements ARE APPROVED; that the Motion for Leave to File Supplement, filed February 6, 1998 by ADX Communications of Pensacola, and the Motion for Leave to file Consolidated Opposition, filed February 19, 1998 by Vernon C. Floyd, ARE GRANTED and the associated pleadings ARE ACCEPTED;[5] that the exceptions filed November 10, 1993 by Vernon C. Floyd ARE DENIED and the exceptions filed November 10, 1993 by Pensacola Radio Partners, Miracle Radio, Inc., and ADX Communications of Pensacola ARE DISMISSED as moot; that the motions to strike filed November 30, 1993 by Pensacola Radio Partners and December 9, 1993 by Miracle Radio, Inc. ARE DISMISSED as moot; that the motion for leave to amend filed February 29, 1994 by ADX Communications of Pensacola IS GRANTED and the amendment IS ACCEPTED; that the application of Vernon C. Floyd (File No. BPH-880324MK) IS DENIED and the applications of Pensacola Radio Partners (File No. BPH-880323MJ) and Miracle Radio, Inc. (File No. BPH-880324NU) ARE DISMISSED; that the application of ADX Communications of Pensacola (File No. BPH-8803240J) IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
Magalie Roman Salas
Secretary

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[5]In the interest Of compiling a full record, we have permitted

the parties to file supplemental pleadings.

APPENDIX H
TESTIMONY OF SUSAN D. HARRISON

1. My name is Susan D. Harrison. I am a principal in Harrison, Bond & Pecaro ("HB&POI) a communications consulting firm located in Washington, D.C. The firm consults with broadcasting industry clients primarily on economic and financial matters relating to the acquisition and start-up of radio and television stations and cable television systems. I founded the firm in 1986. From that time through the present, I have been personally responsible for the completion of approximately 800 fair market valuations of broadcast and cable properties.

2. Before founding HB&P, I was associated for twelve years with the broadcast and cable appraisal firm of Frazier, Gross & Kadlec, Inc. ("FG&KII) in positions of increasing responsibility ranging from Statistical Analyst to Vice President and Director of the firm. During my tenure at FG&K, I was personally responsible for the completion of approximately 750 fair market valuations of broadcast and cable properties, as well as 20 studies to assess the feasibility of building and operating new commercial television stations.

3. In addition, I have conducted market research studies on behalf of applicants for cellular radiotelephone licenses in more than 80 markets to ascertain the level of consumer demand for and price sensitivity to this service. Other new service demand studies I have undertaken range from projects for land mobile satellite communications services to alternative nationwide television programming network.

4. I have provided expert testimony before the Federal

Communications Commission and in District Court, Circuit Court and U.S. Bankruptcy Court in more than thirty proceedings, the bulk of which related to the values of broadcast properties. I have spoken on the topics of radio and television station valuation and acquisition financing at the annual conferences of the National Association of Broadcasters, the Broadcast Financial Management Association, the American Women in Radio and Television Northeast Area Regional Conference, and the FCC's Second Annual Conference on women in Telecommunications, and I have authored articles on these and related issues. I have been quoted in The Wall - Street Journal, Barron's, Broadcasting Magazine, the Detroit Free Press and the St. Louis Business Journal.

5. On March 23, 1988, I received a telephone call from Mary C. Lawless, who I knew to be an attorney with the law firm of Mullin, Rhyne, Emmons and Topel, P.C. Ms. Lawless explained that her client, Vernon C. Floyd, was planning to apply for a new FM radio station in Pensacola, Florida, and that he was interested in having me appraise two radio stations that he owned in Hattiesburg, Mississippi, WORV(AM) and WJMG(FM), to support his certification of financial qualifications. It is likely that Ms. Lawless and I discussed the potential value of Mr. Floyd's stations, and I may have expressed a general opinion regarding the value of Mr. Floyd's stations during that conversation. I did not take notes during our conversation, nor do I recall the details of our discussion. However. I am frequently asked to provide an informal opinion concerning the value or property before I undertake a formal appraisal, and it is likely that I did so here, Particularly since Ms. Lawless had advised me that Mr. Floyd was seeking the appraisal to support his certification of financial qualifications. I advised Ms. Lawless that I would not be

free to conduct the appraisal for at least a week, and she indicated that would be fine. To the best of my recollection, Ms. Lawless did not ask whether the appraisal could be prepared any earlier, nor did she express any concern about the timing of the appraisal. Attached hereto as Appendix A is a letter that I sent to Ms. Lawless following our conversation to confirm our understanding regarding the terms of my retention.

6. In order to conduct the appraisal, I requested and received information concerning the stations' operations and staffing, financial performance and history, equipment, and programming. I then prepared an analysis of the stations' historical financial performance based upon that information. I mathematically computed the stations' net revenues and total operating expenses for the years 1986 and 1987. I then used those figures to calculate the stations I operating cash flow and cash flow margin for each of those years. I studied this information along with data regarding sales of comparable stations in comparable markets during the period prior to the valuation. In addition, I consulted a number of data sources and industry publications, the names of which were included in an appraisal that I addressed to Mr. Floyd on June 8, 1988. In the appraisal, I stated that, in my opinion, the stations' fair market value was between $445,000 and $495,000. I regarded this as a conservative estimate, based on the application of a standard multiple to WORV/WJMG's 1987 operating cash flow.

7. The formulae and methodology that I applied in preparing the Floyd valuation were standard, widely-accepted procedures in the appraisal of broadcast stations. I have used a similar approach in the hundreds of valuations I have prepared over the past 17 years, and that approach has been

accepted in court and at the FCC. It is my opinion that the stations' fair market value as of March 23, 1988 was more 'than sufficient to cover the $260,527.14 budget for the Pensacola station that is attached to Mr. Floyd's testimony as Appendix A. This opinion takes into account the fact that the FCC requires the appraised value of non-liquid assets to be reduced by as much as one-third to account for potential fluctuations in the market.

APPENDIX I

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, limitations, or short of statutory right;

(D) without observance of procedure required by

law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.